Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

JAMES WRAY, (PROPER) TRUSTEE OF THE HOYT SIBLEY AND MARY SIBLEY 1973 TRUST,
Petitioner,
v.
DAVID JOHNSON, (PUTATIVE) TRUSTEE OF THE HOYT SIBLEY AND MARY SIBLEY 1973 TRUST,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of the
State of Nevada

PETITION FOR WRIT OF CERTIORARI

James Wray
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QUESTIONS PRESENTED

Question #1:

Petitioner's Trust was stolen. He *timely* filed a restitution, etc. action. Nevada courts refused to acknowledge the *existence* of the *restitution claim* and dismissed the action, as untimely. Petitioner then *timely* filed a probate petition to recover the Trust. Nevada courts ruled the petition was untimely. Nevada courts concocted their rulings by, blatantly:

1) Misstating the facts;

2) Refusing to address the relevant issues; and,

3) Refusing to apply the applicable law. The question presented is:

Whether citizens are denied their right to due process and equal protection, as guaranteed by §1 of the 14th Amendment to the U.S. Constitution, when justices of a highest state court *intentionally*: misstate the facts; refuse to address the relevant issues; and refuse to apply the applicable law; thereby causing the citizens to lose their cases and property.

Question #2:

Whether the United State Supreme Court should recognize an exception to absolute judicial immunity from suits for damages, when it is undisputed that justices of a state's highest court have: fabricated fraudulent facts; dismissed cases based upon those fraudulent facts; and refused to correct the fraud after being requested to do so.

Question #3:

Whether the Supreme Court should recognize an exception to the *Rooker-Feldman* doctrine to allow a lower federal court to review state court decisions pursuant to 42 U.S.C. § 1983, when it is undisputed that the highest court of a state has fabricated fraudulent facts and dismissed cases based upon those fraudulent facts, thereby depriving citizens of federal constitutional rights under color of state law.

PARTIES TO PROCEEDING

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[1] James Wray is not in the U.S. Supreme Court Bar. So, he is filing pro se. He is in the Nevada and California bars (in good standing, but on inactive status, in both).

[2] David Wray is not an attorney. He has signed on to some of James Wray's Nevada filings and he has joined in many others by means of motions to join in them.

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1. CITIZENS ARE DENIED THEIR RIGHT TO DUE PROCESS, AS GUARANTEED BY §1 OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION, WHEN A CORRUPT

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2. THE UNITED STATE SUPREME COURT SHOULD RECOGNIZE AN EXCEPTION TO ABSOLUTE JUDICIAL IMMUNITY FROM SUITS FOR DAMAGES WHERE IT IS UNDISPUTED THAT JUSTICES OF A STATE'S HIGHEST COURT HAVE FABRICATED FRAUDULENT FACTS AND DISMISSED CASES BASED UPON THOSE FRAUDULENT FACTS. 18

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

On December 21, 2005, the Nevada Supreme Court filed its unreported Order of Affirmance. (App., infra, 3a - 7a) On January 12, 2006, the Nevada Supreme Court filed its unreported Order Denying Rehearing. (App., infra, 8a - 9a) On February 1, 2006, the Nevada Supreme Court filed its unreported Order Denying En Banc Reconsideration. (App., infra, 10a - 11a) On December 29, 2003 the district court filed its unreported Order dismissing the probate petition. (App., infra, 12a-13a) On January 28, 2004, the district court filed its unreported Order denying reconsideration. (App., infra, 14a-15a)

JURISDICTION

On December 21, 2005, the Nevada Supreme Court filed its unreported Order Of Affirmance. (App., infra, 3a - 7a) On January 12, 2006, a timely Petition for Rehearing was denied. (App., infra, 8a - 9a) On February 1, 2006, a timely Petition for En Banc Reconsideration was denied. (App., infra, 10a - 11a) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the 14th Amendment to the United States Constitution states:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they

reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis added.)

Also involved in the requested relief are: 42 U.S.C. § 1983 and 28 U.S.C. § 1257(a), as it relates to the *Rooker-Feldman* doctrine. Those statutes are reproduced, at App., infra, at 74a and 75a, respectively.

STATEMENT OF THE CASE

Raising of the Federal Questions

In the trial level district court, the federal questions were:

1) Raised by Respondent on page 7 of his Sept. 24, 2003 Objection to the (Probate) Petition wherein he stated:

> "On April 10, 2003, James Wray filed an Application for Writ of Certiorari with the United States Supreme Court ... (charging) the Nevada Supreme Court ... (with) fraudulently misstating the facts of the ... (prior restitution case) and dismissing ... (that) case upon misstated facts." (1 A.A. 141.)

2) Confirmed by Petitioner, on page 7 of his Oct. 13, 2003 Reply to the Objection, when he stated:

> "What DAVID JOHNSON says ... (concerning the Petition for Writ of Certiorari) is correct. (The Petition ... is Exhibit #3 to this Reply.)" (2 A.A. 325.)

3) Raised by Petitioner, on pages 7-8 of his Nov. 20, 2003 Counter Argument to the Respondent's Supplement to his (Respondent's) Objection, when he stated to the district court:

> "... [U]ntil the conclusion of the other case, no one, not privy to inside knowledge, could have guessed that both the District Court and the Nevada Supreme Court would totally ignore the restitution cause of action and dismiss the prior lawsuit as if DAVID JOHNSON had never been sued for restitution. Petitioners exhausted all possible appeals ... (including a petition for writ of certiorari to the U.S. Supreme Court) and then promptly filed the (Probate) Petition. ..." (2 A.A. 477-478.) (Emphasis is in the original.)

4) Raised by Petitioner, on pages 1-3 of his Jan. 8, 2004 Motion for Reconsideration in which he stated:

> "The Order of the District Court, filed December 29, 2003 by which the Court sanctions the theft of Petitioners' Trust left to them by their mother is grossly incorrect. Further the subject Order and the proceedings of the District Court which gave rise to it are grossly bias and thus in violation of Section 1 of the 14th Amendment to the United States Constitution which reads:
>
> > "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities ... [of] citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis added.)

...

The bias of ... Chief Judge Douglas ... , presently a candidate running for election to the Nevada Supreme Court, is demonstrated in particular in:

1) The Reporter's Transcript of the November 20, 2003 Hearing filed December 9, 2003 (Exhibit #1 to this Motion.) in which:

A) Despite detailed briefing to the contrary, the Court falsely alleges that the trust allowed Petitioners' to be disinherited from their mother's estate after their mother's death (pg. 3 line 19 -pg 5 line 4);

B) The Court is shown that indeed the trust and wills do not allow the disinheritance of Petitioner's after their mother's death (pg. 5 line 5-pg 14 line 22 & pg 17 line 8-line 10 & pg 42 line 18-pg 45 line 4);

C) The Court is shown that briefing established that res judicata and collateral estoppel do not prevent Petitioners from bringing their Petition to claim their inheritance. (pg 17 line 9-pg 24 line 14 & 29 line 2- pg.32 line 7);

D) The Court ,on its own, finds and applies 2 inapplicable statutes of limitations to terminate Petitioners' attempt to recover their stolen trust (pg 32 line 8-pg 34 line 23 & pg 38 line 19-pg 41 line 7 & especially pg 41 line 21 -pg 42 line 12 & pg 45 line 1 - pg 46 line 8);

E) The Court acquiesces when Mr. Solomon, who knows that there is no applicable statute of limitations and thus did not raise this

argument, requests that the order also be based upon laches (pg 46 line9-line 10).

2) The unopposed Noticed Supplemental Communication filed December 1, 2003 (Exhibit #2 to this Motion.) in which Petitioner James Wray shows the Court that neither any statutes of limitations nor laches bars Petitioners probate proceeding to recover their stolen trust ; and,

3) The December 29, 2003 Order (Exhibit #3 to this Motion.) in which the Court signs an order prepared by Mr. Solomon, etc. barring Petitioners' Petition on grounds of res judicata and/or collateral estoppel and laches.

The bias and indeed blatant fraud of the Nevada Supreme Court in related combined cases Nos. 34914 and 35027 are demonstrated in James Wray's Petition for Writ of Certiorari to the United States Supreme Court No. 02-1496 (Found both as Exhibit #4 to this Motion and Exhibit #3 to Petitioners' Reply filed October 13, 2003.).

Indeed, Chief Judge Douglas, can certainly take judicial notice of the fact that the Nevada Court System is corrupt and strongly bias in favor of powerful Nevada law firms and entities and that Nevada Courts misstate facts and disregard the law in order to allow certain favored entities to prevail." (3 A.A. 577-579.) (Emphasis is in the original.)

5) Presented to the district court as the entire Petition for Writ of Certiorari No. 02-1496 filed with the United States Supreme Court on April 10, 2003:

A) On Oct. 13, 2003, as Exhibit #3 to the Reply to the Objection (2 A.A. 353- 434); and,

B) On Jan. 8, 2004, as Exhibit #4 to the Motion for Reconsideration (3 A.A. 673-4 A.A. 754).

Question #1 of the Questions Presented in the prior Petition

for Writ of Certiorari reads:

> "It is believed that the Nevada Supreme Court frequently alters the facts in cases in order to allow certain parties to win. Petitioner and his brother lost their inheritance from their mother when the Nevada Supreme Court dismissed their restitution and malpractice case on statute of limitation grounds. The undisputed facts showed Petitioner and his brother filed their action well within the applicable time limits. The question presented is:
>
> Whether citizens are denied their right to due process and equal protection, as guaranteed by §1 of the 14th Amendment to the United States Constitution, when a highest state court fraudulently misstates the facts of their case and dismisses their case based upon the misstated facts."
>
> (Found both at 2 A.A. 354 and 3 A.A. 674.)

The district court failed to even address the federal questions in either its December 29, 2003 Order (App., infra, 12a-13a) or its January 28, 2004 Order [denying reconsideration]. (App., infra, 14a-15a)

In the Nevada Supreme Court, the federal questions were:

1) Raised by Petitioner, on page 3 of in his Feb. 20, 2004 docketing statement to the Nevada Supreme Court, wherein he stated in part 9 (Issues on Appeal):

> "Is it a violation of § 1 of the 14th Amendment to the ... [United] States Constitution for Nevada courts to misstate the facts, ignore issues, and fail to apply the law in order to allow certain powerful law firms and entities to prevail before them?"

2) Raised by Petitioner, on pages 18-20 of his Opening Brief, where he states:

> "3. APPELLANTS HAVE BEEN DEPRIVED OF THEIR PROPERTY, WITHOUT DUE PROCESS OF LAW AND HAVE BEEN DENIED THE EQUAL PROTECTION OF THE LAWS IN VIOLATION OF SECTION 1 OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN NEVADA COURTS DISREGARDED THE LAW, IGNORED ISSUES, AND ALTERED THE FACTS IN ORDER TO SANCTION THE THEFT OF APPELLANTS' PROPERTY BY CERTAIN ENTITIES FAVORED BY THE COURTS.
>
> The Order of the District Court, filed December 29, 2003 by which the Court sanctions the theft of Appellants'/Petitioners' Trust left to them by their mother is grossly incorrect. Further the subject Order and the proceedings of the District Court which gave rise to it are grossly bias and thus in violation of Section 1 of the 14th Amendment to the United States Constitution which reads:
>
> > "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities ... [of] citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis by bolding plus underlining added.)
>
> ...

The corruption of then ... Chief Judge Douglas, then a candidate running for election to the Nevada Supreme Court and now an appointed "Justice" of the Nevada Supreme Court, is demonstrated in particular in:

1) The Reporter's Transcript of the November 20, 2003 Hearing filed December 9, 2003 (3 A.A. 519-564.) in which:

A) Despite detailed briefing to the contrary, the Court falsely alleges that the Trust allowed Appellants/Petitioners to be disinherited from their mother's estate after her death (pg. 3 line 19 -pg. 5 line 4);

B) The Court is shown that the briefing established that the Trust and Wills do not allow the disinheritance of Appellants/Petitioners after their mother's death (pg. 5 line 5-pg. 14 line 22 & pg. 17 line 8-line 10 & pg. 42 line 18-pg. 45 line 4);

C) The Court is shown that the briefing established that res judicata and collateral estoppel do not prevent Appellants/Petitioners from bringing their PETITION ... to claim their inheritance. (pg. 17 line 9-pg. 24 line 14 & pg. 29 line 2- pg.32 line 7);

D) The Court, on its own, finds and applies two (2) inapplicable statutes of limitations to terminate Appellants'/Petitioners' attempt to recover their stolen Trust (pg. 32 line 8-pg. 34 line 23 & pg. 38 line 19-pg. 41 line 7 & especially pg. 41 line 21 -pg. 42 line 12 & pg. 45 line 1 - pg. 46 line 8);

E) The Court acquiesces when Mr. Solomon, who knows that there is no applicable statute of limitations and thus did not raise this argument, requests that the order also be based upon laches (pg. 46 line 9-line 10).

2) The unopposed Noticed Supplemental Communication filed December 1, 2003 (3 A.A. 505-

518.) in which Appellant/Petitioner James Wray shows the Court that neither any statutes of limitations nor laches bars Appellants/Petitioners probate proceeding to recover their stolen Trust; and,

3) The December 29, 2003 Order (3 A.A. 565-566.) in which the Court signs an order prepared by Mr. Solomon, etc. barring Appellants's/Petitioners' PETITION ... on grounds of res judicata and/or collateral estoppel and laches.

The bias and blatant fraud of the corrupt Nevada Supreme Court "Justices" in related combined Appeals Nos. 34914 and 35027 are demonstrated in James Wray's Petition for Writ of Certiorari to the United States Supreme Court No. 02-1496. (Found both at 2 A.A. 353-434 and 3 A.A. 673-4 A.A. 754.)" (Emphasis is as in the original.)

3) Raised by Petitioner, on pages 23-24 of his Reply Brief, where he stated:

"3. *DAVID JOHNSON DOES NOT CONTEST THAT:* APPELLANTS HAVE BEEN DEPRIVED OF THEIR PROPERTY, WITHOUT DUE PROCESS OF LAW, AND HAVE BEEN DENIED THE EQUAL PROTECTION OF THE LAWS, IN VIOLATION OF SECTION 1 OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN NEVADA COURTS DISREGARDED THE LAW, IGNORED ISSUES, AND ALTERED THE FACTS, IN ORDER TO SANCTION THE THEFT OF APPELLANTS' PROPERTY BY CERTAIN ENTITIES FAVORED BY THE COURTS.

DAVID JOHNSON and his attorneys have a great interest in defending the rulings of the corrupt Nevada Court system, as they are major beneficiaries of its corrupt rulings. Yet, DAVID JOHNSON does not

contradict anything said in Appellant's above entitled Argument #3. Rather, on page 21 of his Answering Brief, DAVID JOHNSON merely states with no supporting authority:

> "In his Opening Brief, Wray contends that he has been deprived of his property, without due process of law and denied equal protection of the laws in violation of Section 1 of the 14th Amendment to the United States Constitution when Nevada Courts allegedly disregarded the law, ignored issues, and altered the facts in order to sanction the theft of his property by certain entities favored by the court. See Opening Brief at p. 18, Section 3. Notwithstanding that such outrageous contention is not proper before this Court, Respondent is neither a state actor nor the proper party to respond to such allegations. Respondent, however is willing to address such argument in the event this Court requests him to do so."

Respondent's failure to contradict anything said in Argument #3, demonstrates his inability to do so. Especially since Respondent is himself an attorney, and he is represented by Mark Solomon, Dana Dwiggins, and the largest law firm in Nevada: Lionel, Sawyer and Collins with all its available associates and secretarial and paralegal help, DAVID JOHNSON and company's failure to address Argument #3 provides overwhelming proof of the unassailable accuracy of everything said in Appellant's Argument #3. One wonders how many other estates DAVID JOHNSON and his attorneys have been able to steal with the help of corrupt government officials and/or employees from within the State of Nevada?" (Emphasis is in the original.)

4) Raised by Petitioner, on page 1 of his Petition for En Banc Reconsideration, where Petitioner states:

> "... The Order [of Affirmance] has the appearance of fraud in which the Supreme Court panel has multiple times:
>
> 1) Misstated the facts in Appellants' case;
>
> 2) Failed to address Appellants' relevant issues; and,
>
> 3) Failed to apply the applicable law;
>
> all apparently intentionally done in an effort to allow Respondents to escape liability and to allow the theft from Appellants, of Appellants' inheritance from Appellants' mother.
>
> The misdeeds of the panel:
>
> 1) Deny Appellants their inheritance without the due process required by the 14th Amendment to the United States Constitution
>
> ..." (App., infra, at 45a-73a, quote on page 50a)

The Nevada Supreme Court has failed to address, or even mention, the federal questions in any of its orders.

Other Facts Material to a Consideration Of the Questions Presented

Dec. 22. 1997, Petitioner and his brother learned their Trust, from their mother, had been stolen. April 24, 1998, they filed an action for restitution of their Trust, etc. (2 A.A. 348-351. See the Verified Time-Line, App., infra, at 76a-89a.)

On page 3 of his Opening Brief, Petitioner states:

> "In the previous (1998) action, Respondent (therein) DAVID JOHNSON always admitted he was never sued for malpractice, but only for restitution. 2 A.A. 293 - 294. Despite his admission, the Nevada

Supreme Court fixed the restitution case by:

1) Never acknowledging the existence of the restitution issue, *for which there is no statute of limitations* period in Nevada within which a case must be filed;

2) Falsely stating that DAVID JOHNSON had been sued for legal malpractice; and,

3) Fabricating facts upon which it based its ruling that DAVID JOHNSON had been sued beyond the statute of limitations for legal malpractice.

(Please see ... 2 A.A. 379-389 and also ... 3 A.A. 699-709. Please also see ... 2 A.A. 389-399 and also ... 3 A.A. 709-719.) (Emphasis is in the original.)

Quickly after the conclusion of the prior restitution action, Petitioner and his brother filed a July 30, 2003 Probate Petition to recover their stolen Trust. (2 A.A. 348-351. The Petition is found at 1 A.A. 001-116.)

In its Dec. 21, 2005 Order of Affirmance (App., infra, 3a-7a), the Nevada Supreme Court has ruled that laches precluded the Petitioner and his brother from filing their 2003 probate petition to recover their Trust, because: "...the Wrays' inaction caused a material disadvantage..." to David Johnson. But, the Court refuses to acknowledge that:

A) Petitioner and his brother filed their restitution action against David Johnson on April 24, 1998; and,

B) Petitioner and his brother have maintained nearly constant litigation, to recover their stolen Trust, from David Johnson, up until the present. (See Appellants' Petition for En Banc Reconsideration, App., infra, at 45a-73a, applicable part at 51a-55a.)

In addition to filing their Probate Petition, timely, Petitioner and his brother, demonstrated that DAVID

JOHNSON was not even entitled to seek the protection of the equitable doctrine of laches because he (DAVID JOHNSON) had committed: conversion of Petitioner's and his brother's Trust (Opening Brief at pages 15 -18 *[Reproduced at 90a.]*); theft of Petitioner's and his brother's Trust (Reply Brief at pages 22-23 *[Reproduced at 96a.]*); and collusion with the Nevada courts to maintain control of Petitioner's and his brother's Trust (Opening Brief at pages 18 - 20 *[Reproduced at 98a.]*). But, in its Order of Affirmance (App., infra, 3a-7a) the Nevada Supreme Court *blatantly lies* that laches is appropriate because "The Wrays ... fail to allege any actual attempted theft, collusion or conversion by the trustee." (See Appellants' Petition for En Banc Reconsideration, App., infra, at 45a-73a, applicable part at 55a-56a.)

Throughout its Order of Affirmance (App., infra, 3a-7a), the Nevada Supreme Court continually refers to David Johnson as the Trustee and *never even acknowledges* that Petitioner and his brother *have demonstrated that they are the correct Cotrustees of their stolen Trust and David Johnson is not even a valid Trustee.* (See Appellants' Petition for En Banc Reconsideration, App., infra, at 45a-73a, applicable part at 56a-59a.)

Indeed, earlier in the appeal process, the Nevada Supreme Court failed to grant Petitioner's totally unopposed Motion That the Nevada Supreme Court Alter its Bias Caption which improperly assigned to David Johnson the incorrect title of Trustee. (Please see the Verified Time-Line, App., infra, at 76a-89a, applicable dates June 29, 2004 through April 5, 2005 [found beginning on 81a and ending near the end of 85a].)

In its Order of Affirmance (App., infra, 3a-7a), the Nevada Supreme Court *ignores* the Trust and Wills, and the law, and *blatantly lies*:

A) The Survivor's Trust could be amended to take it from Appellants; and,

B) The Decedent's Trust could be appointed to someone other than Appellants. (See Appellants' Petition for En Banc Reconsideration, App., infra, at 45a-73a, applicable part at 59a-65a.)

In its Order of Affirmance (App., infra, 3a-7a), the Nevada Supreme Court continues to grossly *misstate* the facts of the prior lawsuit, most importantly by:

A) Not acknowledging the existence of the restitution claim in the prior lawsuit;

B) Misstating that, in the prior lawsuit, Appellants alleged drafting errors; when, instead, the prior lawsuit included *no* claim for drafting errors; and,

C) Misstating that in the prior lawsuit, the Appellants alleged that the Trust, as drafted, was contrary to the intent of the settlors; when, instead, the Appellants have always contended that, properly interpreted, the settlors' Trust and Wills reflect their intention to leave their estate primarily to Mary Sibley's sons, the Appellants. (See Appellants' Petition for En Banc Reconsideration, App., infra, at 45a-73a, applicable part at 65a-71a.)

REASONS FOR GRANTING THE PETITION

1. CITIZENS ARE DENIED THEIR RIGHT TO DUE PROCESS, AS GUARANTEED BY §1 OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION, WHEN A CORRUPT STATE COURT FRAUDULENTLY MISSTATES THE FACTS OF THEIR CASES, REFUSES TO APPLY THE APPLICABLE LAW, AND REFUSES TO ADDRESS IMPORTANT ISSUES; AND, THEREBY, DISMISSES THEIR CASES, CAUSING SUCH CITIZENS TO LOSE PROPERTY. THE UNITED STATES SUPREME COURT SHOULD RULE THAT ANY SUCH RESULTING JUDGMENT(S) ARE VOID.

We have been instructed:

"... [T]here are two major exceptions to the rule against reconsideration of findings of fact. The Supreme Court will review a state court's findings "where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it; ..." *Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927). And see *Creswill v. Knight of Pythias*, 225 U.S. 246, 261 (1912); *Sterling v. Constantin*, 287 U.S. 378, 398 (1932)." Supreme Court Practice, 8th Ed. (2002) at page 216. (Emphasis added.)

Petitioner has shown in the Statement of the Case that the Nevada Supreme Court fraudulently misstated the facts and dismissed Petitioner's and his brother's cases based upon the fraudulent facts. It is undisputed that the fraudulent facts are without evidence to support them. This is a violation of the due process and equal protection rights guaranteed by the Section 1 of the 14th Amendment to the United States Constitution.

It is reported, that United States Supreme Court Justice Anthony M. Kennedy has warned:

"... Just recently, two justices of the United States Supreme Court spoke out against threats to judicial neutrality. One of those threats, according to Justice Anthony M. Kennedy, is campaign spending in state judicial elections. See Joan Biskupie, In Rare Appearances, 2 Justices Concur Against Threats to Neutrality, Wash. Post, December 6, 1998, available in 1998 WL 22539304. Justice Kennedy made a more impassioned point in summarizing his concerns: "The law makes a promise. The promise is neutrality. If that promise is broken, the law ceases to exist. All that's left is the dictate of a tyrant, or a mob."

Dababnah v. West Virginia Bd. Of Medicine, 47 F. Supp.2d 734, 749 (S.D.W.Va. 1999) (Emphasis added.)

The Nevada Supreme Court has broken the promise of neutrality, in Petitioner's cases, when it fraudulently misstated the facts, refused to apply the applicable law, and refused to address important issues; all done to allow the Nevada Supreme Court to produce decisions favorable to Petitioner's adversaries who are powerful entities favored by that court. By these blatantly corrupt acts, that court denied Petitioner and his brother the protections of Section 1 of the 14th Amendment to the United States Constitution, which reads:

> "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis added.)

It is undisputed that the Nevada Supreme Court has grievously misstated the facts in Petitioner's and his brother's cases and dismissed these cases based upon the grossly misstated facts. It is also undisputed that the Nevada Supreme Court refused to apply the applicable law, and refused to address important issues. (See the Statement of the Case, supra.) Further, Petitioner told the Nevada Supreme Court of the misstatements of facts, the un-applied law and unaddressed issues in his Amended Petition for Rehearing (App., infra, 16a-44a) and also in his Petition for En Banc Reconsideration (App., infra, 45a-73a). But the Nevada Supreme Court Denied Rehearing (App., infra, 8a-9a) and also denied En Banc Reconsideration (App., infra, 10a-11a), even after being fully and concisely warned of the grossly misstated facts; the un-applied law; and the ignored issues.

Petitioner and his brother have thus been denied due process and equal protection as guaranteed by Section 1 of the 14th Amendment to the United States Constitution.

The United States Supreme Court should ensure that due process and equal protection of the laws are indeed provided by state court systems for U.S. citizens who must appear before them. Therefore, the United States Supreme Court should emphatically state that when a highest court in a state,

1) Mistakes the facts in a case, fails to apply the applicable law, and fails to address important issues;

2) Then, has been clearly apprised of its misstatements of the facts; failure to apply the applicable law; and failure to address important issues; and,

3) Even then, such court refuses to alter its misstatements of the facts; refuses to apply the applicable law; and refuses to address the important issues;

such highest state court has violated due process and equal protection rights as guaranteed by the Section 1 of the 14th Amendment to the United States Constitution and the court's subject rulings are therefore void.

Finally, in addition to voiding the fraudulent rulings of the Nevada Supreme Court by which Petitioner's Trust has been taken from him in violation of the 14th Amendment to the US Constitution, Petitioner requests that the United States Supreme Court:

1) Order that he and his brother are entitled to the Trust which has been stolen from them; and,

2) Appoint a truly neutral visiting federal judge having no connection to the corrupt State of Nevada to oversee any later court proceedings involving:

A) Attempts to trace and recover stolen Trust assets;

B) Efforts to obtain just compensation for the

time that these assets have been improperly withheld and the effort and expense involved in seeking their return; and,

C) Related matters.

2. THE UNITED STATE SUPREME COURT SHOULD RECOGNIZE AN EXCEPTION TO ABSOLUTE JUDICIAL IMMUNITY FROM SUITS FOR DAMAGES WHERE IT IS UNDISPUTED THAT JUSTICES OF A STATE'S HIGHEST COURT HAVE FABRICATED FRAUDULENT FACTS AND DISMISSED CASES BASED UPON THOSE FRAUDULENT FACTS.

The United States Supreme Court has stated in Forrester v. White, 484 U.S. 219, 226, 227, 230, 108 S.Ct. 538, 544, 545, 546, 98 L.Ed.2d 555 (1988):

> "The purposes served by judicial immunity from liability in damages have been variously described. In *Bradley v. Fischer, supra*, at 348, and again in *Pierson v. Ray, supra*, at 554, the Court emphasized that the nature of the adjudicative function requires a judge frequently to disappoint some of the most intense and ungovernable desires that people can have. ... If judges were personally liable for erroneous decisions, the resulting avalanche of suits, most of them frivolous, but vexatious, would provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits. ... The resulting timidity would be hard to detect or control, and it would manifestly detract from independent and impartial adjudication. Nor are suits against judges the only available means through which litigants can protect themselves from the consequences of judicial error. **Most judicial mistakes or wrongs are open to correction through ordinary mechanisms of review**, which are largely free of the harmful side-effects inevitably associated with exposing judges to

personal liability.

When applied to the paradigmatic judicial acts involved in resolving disputes between parties who have invoked the jurisdiction of a court, the doctrine of absolute judicial immunity has not been particularly controversial. ...

... Absolute immunity, however, is "strong medicine, justified only when the danger of [officials' being] deflected from the effective performance of their duties is very great." 792 F.2d, at 660 (Posner, J. dissenting). The danger here is not great enough. ...

We conclude that Judge White was not entitled to absolute immunity for his decision to demote and discharge Forrester. ..." (Emphasis added.)

The Nevada "justice" have not merely erred in making decisions, rather, they have *intentionally* grossly misstated the facts in Petitioner's and his brother's cases and then thrown the cases out on statute of limitation grounds and laches, respectively, based upon the grossly incorrect facts. (Please see the Petition for En Banc Reconsideration, infra, 45a-73a.).

Under such circumstances, allowing such "justices" to protect themselves with absolute immunity from suits for damages is not only not justified, but also, encourages persons having criminal intent to seek judicial office. Since, such dishonest persons will realize that, as judge, they will be free of any civil repercussion from their fraudulent acts and if they are powerful and stick together, they are also very unlikely to suffer any censure or criminal prosecution for their fraudulent acts. Thus, in these circumstances, absolute judicial immunity encourages the rule of the mob and not the law and results in denial of due process and denial of equal protection to citizens of the United States who must appear before such dishonest courts as the Nevada Supreme Court.

Finally, when the highest court in a state is peopled by such a mob of "justices", there is no option for correction of their fraudulent judgments, except, by writ of certiorari to the United States Supreme Court of which we are told:

> " "The jurisdiction of the Supreme Court to review decisions of the state courts is presently codified in 28 U.S.C. §1257(a). It is the direct descendant of Section 25 of the Judiciary Act of 1789. Various amendments to this statute have been made from time to time, the most recent being the Act of June 27, 1988. 102 Stat. 662. That Act abolished the last remnant of the "appeal" path, a path that formerly led to mandated Supreme Court review of many final state court judgments that involved federal issues. Now all those who seek such review must follow the "certiorari" path, **the path that leads to review only of those relatively few cases that the Court–in its discretion–wishes to hear and decide on the merits.** ..." Supreme Court Practice, 8th Edition (2002), at page 136: (Emphasis added.)

Thus, Petitioner suggests that under such circumstances when:

1) The facts stated are blatantly incorrect;

2) The state's highest court is told of that the facts are not only incorrect, but are blatantly so; and,

3) The state's highest court, without disputing that it has grossly misstated the facts, refuses to correct its fraud,

the "justices" of such a court should no longer be protected by the common law doctrine of absolute judicial immunity and should be subject to suits for damages.

Because, otherwise, the vast majority of persons will have no viable remedy, from such fraud, as they are very unlikely to be fortunate enough to convince the United States Supreme Court

to grant certiorari to review such fraudulent decisions. [1]

The egregious manner in which the highest court of Nevada has handled Petitioner's related cases presents an excellent opportunity for the United States Supreme Court to rethink the concept of "absolute judicial immunity." Please see **Judicial Immunity from Civil and Criminal Liability, 27 San Diego Law Review 1 (1990)** wherein on page 28 the author concludes:

> "It is said that this grant of absolute immunity for judges is necessary to maintain judicial independence and to protect judges from harassment by disgruntled litigants. Surely these are admirable goals, but whether absolute immunity, as distinct from qualified immunity, is truly necessary to effectuate them is an open question. **A grant of immunity for intentional and malicious civil wrongs has not been found to be necessary in the executive branch of government.** Judicial independence should be scrupulously guarded and some degree of immunity from civil liability must be maintained for judges. **But absolute judicial immunity from civil liability remains a debatable practice.**" (Emphasis added.)

3. IF THE UNITED STATES SUPREME COURT RECOGNIZES AN EXCEPTION TO ABSOLUTE JUDICIAL IMMUNITY FROM SUITS FOR DAMAGES WHERE JUSTICES OF A STATE'S HIGHEST COURT HAVE FABRICATED FRAUDULENT FACTS, THERE IS NO MEANINGFUL REMEDY UNLESS PERSONS HARMED CAN SUE IN THE FEDERAL SYSTEM PURSUANT TO 42 U.S.C. § 1983.

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[1] On page 60 of **Supreme Court Practice, 8th Edition** (2002), it is stated: "...[T]he odds that any private party petition filed on the paid docket will be granted ..., barely ... [reach] the 1 percent mark."

"Under the language of 42 USCS § 1983, ... "[e]very person" who brings about the deprivation of the federal constitutional or statutory rights of another under color of state law is liable to the party injured. Notwithstanding such inclusive language, it has been expressly held or recognized by the Supreme Court ... that the rule under which a judge is immune from liability for damages is applicable in suits brought against a judge under § 1983.

In Pierson v. Ray (1967) 386 US 547, 18 L Ed 2d 288, 87 S Ct 1213, the court held that the settled principle of law that judges were immunized from liability for damages for acts committed within their judicial jurisdiction was not abolished by the enactment of 42 USCS § 1983. ..." **Supreme Court's Views As to Judges Liability for Damages**, 116 L.Ed. 947, 954.

When the highest court in a state fraudulent misstates the facts; dismisses cases based upon its fraudulent facts; and refuses to correct the fraud after being requested to do so, a suit for damages should be allowed in federal court under 42 U.S.C. § 1983. Otherwise, citizens thereby denied their constitutional rights will have no reasonable remedy, since the United States Supreme Court so seldom exercises its right to grant petitions for certiorari from highest state courts (**Supreme Court Practice**, 8th Edition (2002) at pages 60 and 136), and:

"...Otherwise there would be no federal remedy for a violation of federal rights whenever the violators so far succeeded in corrupting the state judicial process to obtain a favorable judgment, ... This result would be inconsistent with cases in which, for example, police officers are sued under 42 U.S.C. § 1983 for having fabricated evidence that resulted in the plaintiff's being convicted in a state court. ... Nesses v. Shepard, 68

F.3d 1003, 1005 (7th Cir. 1995)

4. IF THE SUPREME COURT ALLOWS 42 U.S.C. § 1983 CASES TO BE BROUGHT WHERE JUSTICES OF A STATE'S HIGHEST COURT HAVE FABRICATED FRAUDULENT FACTS, THE SUPREME COURT SHOULD ALSO ALLOW THE FRAUDULENT JUDGMENTS RESULTING FROM SUCH MISCONDUCT, NOT ONLY TO BE EXAMINED AS EVIDENCE, BUT ALSO TO BE RULED VOID, BY THE FEDERAL COURTS PRESIDING OVER SUCH 42 U.S.C. § 1983 CASES.

We have been instructed:

> "The Court in more recent times has proclaimed that its jurisdiction over "final" decisions of state courts, as now embodied in 28 U.S.C. § 1257(a), is exclusive in nature ... [under the *Rooker-Feldman* doctrine] ... , thus barring lower federal courts from reviewing final state court decisions dealing with federal issues." Supreme Court Practice, 8th Edition (2002) at page 129-130. (Emphasis added.)

However, the US Supreme Court only accepts very few of the cases submitted to it. (Supreme Court Practice, 8th Edition (2002) at pages 60 and 136) Thus, unless the United State Supreme Court allows the federal courts, as part of a 42 U.S.C.S. § 1983 action, to pass upon the validity of fraudulent judgments issued by corrupt judges, there will be no review or correction of the vast majority of such fraudulent judgments. Thus, Petitioner requests that the United States Supreme Court:

1) Specifically recognize an exception to the *Rooker-Feldman* doctrine when a 42 U.S.C.S § 1983 action has been brought against justices of a state's highest court who have fabricated fraudulent facts and dismissed a case based upon those fraudulent facts and refused to correct the fraud after

being requested to alter the indisputably fraudulent facts;

2) Specifically allow not only a suit for damages against such corrupt justices, but also allow the federal courts to review and overturn the resulting fraudulent judgments of such justices.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectively submitted. Signed March 6th, 2006,

by: James Wray

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David Wray
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Appellant in Pro Per below

No.

In The

Supreme Court of the United States

JAMES WRAY, (PROPER) TRUSTEE OF THE HOYT SIBLEY AND MARY SIBLEY 1973 TRUST,
Petitioner,
v.
DAVID JOHNSON, (PUTATIVE) TRUSTEE OF THE HOYT SIBLEY AND MARY SIBLEY 1973 TRUST,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Nevada

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APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE INTER VIVOS TRUST OF: HOYT SIBLEY AND MARY M. SIBLEY.	)	No. 42751
JAMES WRAY AND DAVID WRAY, Appellants, vs. DAVID JOHNSON, TRUSTEE OF THE HOYT SIBLEY AND MARY SIBLEY 1973 TRUST, Respondent.	)	FILED DEC 21 2005 Janette M. Bloom Clerk of Supreme Court By s/J. Richards Chief Deputy Clerk

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying the petition of James Wray and David Wray to confirm an inter vivos trust executed by their mother, Mary M. Sibley, and their stepfather, Hoyt Sibley. Eighth Judicial District Court, Clark County; Michael L. Douglas, Judge.

Mary Sibley died on July 28, 1991, leaving Hoyt Sibley as her surviving spouse. James and David Wray are Mary Sibley's sole surviving children. Starting in 1973, Mr. and Mrs. Sibley entered into a comprehensive estate plan including a trust arrangement. They substantially amended the arrangement in 1986 and executed individual pour-over wills that left the entirety of their estate to the trust. Section 3.3 of the trust granted both settlors a general power to appoint or distribute the trust estate, which the Sibleys could exercise jointly with respect to community property and individually

with respect to separate property, during their lives or by will.[1]

The trust provided that, upon the death of the first spouse, the trust was to be divided into two separate trusts, a "Survivor's Trust" and a "Decedent's Trust." The Survivor's Trust remained fully revocable and amendable by the survivor until his or her death, leaving the survivor with the unfettered ability to amend the Survivor's Trust during his lifetime. The Decedent's Trust was structured differently. This trust arrangement because irrevocable upon Mary Sibley's death, giving Mr. Sibley the enjoyment of the assets during his lifetime.[2] Interestingly, the surviving spouse was given a special power of appointment as follows:

> The surviving spouse shall also have, with regard to the principal of the Decedent's Trust, the power to appoint said Trust, or any part thereof, either during life or by Will, to one or more persons or entities; provided, that this power may not be exercised to any extent in favor of the surviving spouse [or his or her creditors or the creditors of his or her estate].

The Sibleys executed the final joint amendment to the trust in May of 1991, shortly before Mrs. Sibley's death, under which James and David Wray were the named beneficiaries. Pursuant to her will executed April 24, 1986, she left the entirety of her estate to the trust. After Mrs. Sibley died, Mr. Sibley amended the Survivor's Trust or exercised the special power of appointment of the Decedent's Trust several times. At the time

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[1]Prior to Mrs. Sibley's death, the Sibleys exercised this power several times, omitting both of the Wray brothers as beneficiaries on one occasion and omitting one of the two on two other occasions.

[2]This right was not without restriction. While Section 4.3 of the trust granted the survivor access to the principal of the Decedent's Trust for his support, maintenance, and health, distributions from the principal constituted a debt owed to the Decedent's Trust by the Survivor's Trust if the Survivor's Trust was not exhausted.

of his death in 1997, provisions exercising the amended (sic) special power left the corpus of the Decedent's Trust to persons other than James and David.

In 1998, the Wrays filed a malpractice and fraud action against the attorney that drafted the trust, and the attorney that served as trustee. The complaint alleged in part that the estate-planning attorney negligently drafted the special power of appointment in favor of the surviving spouse contrary to the intent of the settlors. The district court granted summary judgment in the matter on statute of limitations grounds and for lack of proof of fraud. Citing the fact that the Wrays because aware of the terms of the trust shortly after their mother's demise in 1991, and citing deficiencies of proof, we finally affirmed via unpublished order on December 17, 2002.[3]

The Wrays did not file the petition below until July 2003, after the conclusion of the previous action. In that petition, they sought, inter alia, distribution of the trust estate to confirm to an alleged agreement not to amend the trust so as to divest the Wrays made between Mr. and Mrs. Sibley while they were both alive, imposition of an equitable lien and constructive trust on distributed assets, and to have the trust assets plus interest returned to them as the rightful beneficiaries of the trust. Because Mr. Sibley exercised his special power of appointment by amending the trust after the death of Mrs. Sibley, the Wrays contended that the exercise of the special power in favor of third parties violated the Sibleys' intent while they were alive. From this they argued that the trust corpus should be confirmed to them. The district court dismissed the petition based upon res judicata, collateral estoppel and laches.

On appeal, the Wrays argue that the doctrine of laches does not bar their probate petition, and that respondent David Johnson is not entitled to assert laches as a defense to the

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[3]Two justices dissented from the dismissal of the case on statute of limitations grounds.

probate petition due to unclean hands. Laches is an equitable doctrine that "'may be invoked when delay by one party works to the disadvantage of the other, causing a change of circumstances which would make the grant of relief to the delaying party inequitable.'"[4] A party must show that the delay caused actual prejudice;[5] the alleged prejudice cannot be prospective or illusory.[6] "'The condition of the party asserting laches must become so changed that the party cannot be restored to its former state.'"[7]

Here nothing barred the Wrays from filing their petition in the probate forum in an action parallel to their 1998 malpractice/fraud action. Instead, without explanation, the Wrays waited until 2003, after a final order was entered in the previous case, to file the instant petition. While it may have made little sense to move to confirm the trust in 1991 because they were the beneficiaries, they could have filed their petition in December 1997 after Mr. Sibley's death, at which time the power of appointment excluding the Wrays became final. In addition, the special power of appointment seemingly gave the survivor the right to appoint the corpus to anyone, including or

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[4]Mackintosh v. California Fed. Sav., 113 Nev. 393, 404, 935 P.2d 1154, 1161 (1997) (quoting Building & Const. Trades v. Public Works, 108 Nev. 605, 610-11m 836 P.2d 633, 636-37 (1992)).

[5]Besnilian v. Wilkinson, 117 Nev. 519, 522, 25 P.3d 187, 189 (2001).

[6]Memory Gardens v. Pet Ponderosa, 88 Nev. 1, 5, 492 P.2d 123, 125 (1972).

[7]Carson City v. Price, 113 Nev. 409, 412, 934 P.2d 1042, 1043 (1997) (quoting Home Savings v. Bigelow, 105 Nev. 494, 496, 779 P.2d 85, 86 (1989)).

excluding the two brothers.[8]

Most tellingly, the Wrays' inaction caused a material disadvantage to both the trustee and the trust because the trust property had already been distributed to its multiple beneficiaries and now the trust cannot be restored to its former state. The Wrays's charge of unclean hands against the trustee is an attempt to argue the underlying merits of their case; they fail to allege any actual attempted theft, collusion or conversion by the trustee.

In light of the above, we conclude that the district court properly dismissed the petition based upon laches. Because this issue is dispositive, we do not reach the issue of res judicata and collateral estoppel. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

s/Maupin _____, J.
Maupin

s/Gibbons _____, J.
Gibbons

s/Hardesty _____, J.
Hardesty

cc: Eighth Judicial District Court Dept. 11, District Judge
James H. Wray 111
David Wray
Lionel Sawyer & Collins/Las Vegas
Clark County Clerk

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[8]It seems unlikely that the power of appointment provision and the 1986 will were vulnerable to contest based upon a charge of undue influence as of Mrs. Sibley's death. Although Mr. and Mrs. Sibley executed the last trust amendment shortly before her demise, the will and power of appointment provisions had been in place for years.

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE INTER VIVOS TRUST OF: HOYT SIBLEY AND MARY M. SIBLEY.	)	No. 42751
JAMES WRAY AND DAVID WRAY, Appellants, vs. DAVID JOHNSON, TRUSTEE OF THE HOYT SIBLEY AND MARY SIBLEY 1973 TRUST, Respondent.	)	FILED JAN 12 2006 Janette M. Bloom Clerk of Supreme Court By s/J. Richards Chief Deputy Clerk

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).
It is so ORDERED.

s/Maupin, J.
Maupin

s/Gibbons, J.
Gibbons

s/Hardesty, J.
Hardesty

cc: Eighth Judicial District Court Dept. 11, District Judge
James H. Wray 111
David Wray

Lionel Sawyer & Collins/Las Vegas
Clark County Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE INTER VIVOS TRUST OF: HOYT SIBLEY AND MARY M. SIBLEY.	No. 42751
JAMES WRAY AND DAVID WRAY, Appellants, vs. DAVID JOHNSON, TRUSTEE OF THE HOYT SIBLEY AND MARY SIBLEY 1973 TRUST, Respondent.	FILED FEB 1 2006 Janette M. Bloom Clerk of Supreme Court By s/J. Richards Chief Deputy Clerk

ORDER DENYING EN BANC RECONSIDERATION

Having considered the petition on file herein, we have concluded that en banc reconsideration is not warranted. NRAP 40A. Accordingly, we

ORDER the petition DENIED.°

s/Rose ,C.J.
Rose

s/Becker ,J
Becker

s/Maupin , J.
Maupin

s/Gibbons , J.
Gibbons

°The Honorable Michael L. Douglas, Justice, voluntarily recused himself from participation in the decision of this matter.

s/Hardesty, J.
Hardesty

s/Parraguirre, J.
Parraguirre

cc: Eighth Judicial District Court Dept. 11, District Judge
James H. Wray 111
David Wray
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FILED
Dec 29 2:45 PM '03
Shirley B.
Parraguirre
CLERK

Attorneys for Respondent David Johnson, Trustee
of the Hoyt Sibley and Mary M. Sibley 1973 Trust

DISTRICT COURT
CLARK COUNTY, NEVADA

In the Matter of the Inter)	Case No. P50137
Vivos Trust of: HOYT SIBLEY)	Dept. No. XI
AND MARY M. SIBLEY1973)	
TRUST.)	Date of Hearing:
)	November 20, 2003
	Time of Hearing:
	9:00 a.m.

ORDER

Petitioners' James Wray and David Wray's, (sic) Petition to Confirm a Trust and the Proper Trustees, Interpret a Trust, for Declaratory Relief and for Other Injunctive Relief, having come on regularly for hearing on the 20th day of November, 2003; Mark A. Solomon, Esq. of the law firm of Lionel Sawyer & Collins appeared as counsel for Respondent David Johnson, Trustee of the Hoyt and Mary Sibley 1973 Trust. James Wray and David Wray appeared in proper person. After reviewing the pleadings, hearing the arguments of counsel and good

cause appearing therefor,

IT IS HEREBY ORDERED that the issues and claims raised in the instant Petition to Confirm a Trust and the Proper Trustees, Interpret a Trust, for Declaratory Relief and for Other Injunctive Relief are barred by the doctrine of *res judicata* and/or collateral estoppel; and

IT IS HEREBY FURTHER ORDERED that the issues and claims raised in the instant Petition to Confirm a Trust and the Proper Trustees, Interpret a Trust, for Declaratory Relief and for Other Injunctive Relief are barred by the doctrine of laches.

DATED this 23rd day of December, 2003.

s/ Michael Douglas
DISTRICT COURT JUDGE

Submitted by:

LIONEL SAWYER & COLLINS

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FILED
Jan 28 11:56 AM '04
Shirley B.
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Attorneys for Respondent David Johnson, Trustee of the Hoyt Sibley and Mary M. Sibley 1973 Trust

DISTRICT COURT
CLARK COUNTY, NEVADA

In the Matter of the Inter Vivos Trust of: HOYT SIBLEY AND MARY M. SIBLEY1973 TRUST.	Case No. P50137 Dept. No. XI Date of Hearing: January 26, 2003 Time of Hearing: 9:00 a.m.

ORDER

Petitioners' James Wray and David Wray's Motion for Reconsideration having come on regularly for hearing on the 26th day of January, 2004; Mark A. Solomon, Esq. of the law firm of Lionel Sawyer & Collins appeared as counsel for Respondent David Johnson, Trustee of the Hoyt and Mary Sibley 1973 Trust. James Wray and David Wray appeared in proper person. After reviewing the pleadings, hearing the arguments of counsel and good cause appearing therefor,

///

IT IS HEREBY ORDERED that the Motion for Reconsideration is denied.

DATED this 27th day of January, 2004.

s/ Michael Douglas
DISTRICT COURT JUDGE

Submitted by:

LIONEL SAWYER & COLLINS

By: s/ Dana A. Dwiggins
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IN THE SUPREME COURT OF THE STATE OF NEVADA

In the Matter of the Inter Vivos Trust of: HOYT SIBLEY AND MARY M. SIBLEY1973 TRUST	No. 42751
JAMES WRAY AND DAVID WRAY (Proper) TRUSTEES OF THE HOYT SIBLEY AND MARY SIBLEY 1973 TRUST Appellants, vs. DAVID JOHNSON, (Putative) TRUSTEE OF THE HOYT SIBLEY AND MARY SIBLEY 1973 TRUST Respondent.	FILED JAN 4 2006 Janette M. Bloom Clerk of Supreme Court By_____ Chief Deputy Clerk

AMENDED PETITION FOR REHEARING OF APPELLANT JAMES WRAY,
AS A RESULT OF THE ORDER OF AFFIRMANCE FILED IN THIS APPEAL ON DECEMBER 21, 2005

APPEAL FROM THE EIGHTH JUDICAL DISTRICT COURT DEPARTMENT XI (PROBATE), JUDGE MICHAEL L. DOUGLAS

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Attorneys for Respondent,
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Appellant in Pro Per

TABLE OF CONTENTS — Page(s)

1. THE COURT MISSTATES THAT APPELLANTS' "...INACTION CAUSED A MATERIAL DISADVANTAGE ..." TO DAVID JOHNSON. BUT, THE COURT REFUSES TO ACKNOWLEDGE THAT:

A) APPELLANTS FILED THEIR RESTITUTION ACTION AGAINST DAVID JOHNSON ON APRIL 24, 1998; AND,

B) APPELLANTS HAVE MAINTAINED NEARLY CONSTANT LITIGATION, TO RECOVER THEIR STOLEN TRUST, FROM DAVID JOHNSON, UP UNTIL THE PRESENT. 1-2 [here: 21a-24a]

2. APPELLANTS HAVE DEMONSTRATED CONVERSION, THEFT, AND COLLUSION BY DAVID JOHNSON. BUT, THE COURT *MISSTATES* THAT LACHES IS APPROPRIATE BECAUSE "THE WRAYS ... FAIL TO ALLEGE ANY ACTUAL ATTEMPTED THEFT, COLLUSION OR CONVERSION BY THE [PURPORTED] TRUSTEE [DAVID JOHNSON]." 2-3 [here: 24a-25a]

3. THROUGHOUT ITS ORDER, THE COURT CONTINUALLY REFERS TO DAVID JOHNSON AS THE TRUSTEE AND *NEVER EVEN ACKNOWLEDGES* THAT *APPELLANTS HAVE DEMONSTRATED THAT THEY ARE THE CORRECT COTRUSTEES OF THEIR STOLEN TRUST AND DAVID JOHNSON IS NOT EVEN A VALID TRUSTEE*. 3-4
[here: 25a-29a]

4. THE COURT *IGNORES* THE TRUST AND WILLS, AND THE LAW, AND *MISSTATES*:

A) THE SURVIVOR'S TRUST COULD BE AMENDED TO TAKE IT FROM APPELLANTS; AND,

B) THE DECEDENT'S TRUST COULD BE APPOINTED TO SOMEONE OTHER THAN APPELLANTS. 4-8
[here: 29a-36a]

5. IN ITS ORDER, THE SUPREME COURT CONTINUES TO GROSSLY *MISSTATE* THE FACTS OF THE PRIOR LAWSUIT, MOST IMPORTANTLY BY:

A) NOT ACKNOWLEDGING THE EXISTENCE OF THE RESTITUTION CLAIM IN THE PRIOR LAWSUIT;

B) MISSTATING THAT, IN THE PRIOR LAWSUIT, APPELLANTS ALLEGED DRAFTING ERRORS; WHEN INSTEAD, THE PRIOR LAWSUIT INCLUDED *NO* CLAIM FOR DRAFTING ERRORS; AND,

C) MISSTATING THAT IN THE PRIOR LAWSUIT, THE APPELLANTS ALLEGED THAT THE TRUST AS DRAFTED WAS CONTRARY TO THE INTENT OF THE SETTLORS; WHEN, INSTEAD, THE APPELLANTS HAVE ALWAYS CONTENDED THAT, PROPERLY INTERPRETED, THE SETTLORS' TRUST AND WILLS REFLECT THEIR INTENTION TO LEAVE THEIR ESTATE PRIMARILY TO MARY SIBLEY'S SONS, THE APPELLANTS.

8-10
[here: 36a-42a]

Pursuant to NRAP 40, Appellant James Wray hereby requests a REHEARING of the APPEAL, as a result of the Order of Affirmance filed in this Appeal on December 21, 2005 [Order].

1. THE COURT MISSTATES THAT APPELLANTS' "...INACTION CAUSED A MATERIAL DISADVANTAGE..." TO DAVID JOHNSON. BUT, THE COURT REFUSES TO ACKNOWLEDGE THAT:

A) APPELLANTS FILED THEIR RESTITUTION ACTION AGAINST DAVID JOHNSON ON APRIL 24, 1998; AND,

B) APPELLANTS HAVE MAINTAINED NEARLY CONSTANT LITIGATION, TO RECOVER THEIR STOLEN TRUST, FROM DAVID JOHNSON, UP UNTIL THE PRESENT.

On pages 4 - 5 of its Order, the Court distorts:

> "Here, nothing barred the Wrays from filing their petition in the probate forum in an action parallel to their 1998 malpractice/fraud action. Instead, without explanation, the Wrays waited until 2003, after a final order was entered in the previous case, to file the instant petition. While it may have made little sense to move to confirm the trust in 1991 because they were the beneficiaries, they could have filed their petition in December of 1997 after Mr. Sibley's death, ...
>
> Most tellingly, the Wrays's inaction caused a material disadvantage to both the trustee and the trust because the trust property had already been distributed to its multiple beneficiaries and now the trust cannot be restored to its former state.... [Emphasis added.]

The truth is, Appellants included a claim for restitution, of their Trust, within their April 24, 1998 lawsuit. Thus, Appellants' 1998 lawsuit fully alerted DAVID JOHNSON

that Appellants contended that they were the rightful owners of their stolen Trust and they wanted it returned to them. [Opening Brief at pgs. 12 - 13. {Citing to 2 A.A. 348-351 & 1 A.A. 138-141}] DAVID JOHNSON, himself, states in his Answering Brief:

> "...[T]he claims set forth in the later filed probate petition are identical to the issues which were previously raised ... in the prior lawsuit against David Johnson, the Trustee ... Similar to the prior lawsuit, the probate petition ... seeks an accounting ... , restitution and/or imposition of a constructive trust ... [DAVID JOHNSON's Answering Brief at page 1.]
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> ...
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> On April 24, 1998, Wray (along with his brother David Wray) filed a Complaint in the Eighth Judicial District Court against Charles Johnson and Charles Johnson and/or David Johnson, as Trustee of the Sibley Trust....1 A.A. 157-170... [DAVID JOHNSON's Answering Brief at page 3.]
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> ...
>
> ... [I]n the prior lawsuit Wray litigated the issues of whether he and his brother they (sic) were entitled to an accounting of the Sibley Trust, restitution and/or the imposition of a constructive trust. ... 1 A.A. 166 It is the same issues Wray sought to have the District Court decide in the Probate Petition....1 A.A. 1-116 at 9-11..." [DAVID JOHNSON's Answering Brief at page 18.] [Emphasis added.]

DAVID JOHNSON's own just quoted language, proves that Appellants sought restitution of their stolen Trust in their initial action filed April 24, 1998.

Finally, on pages 12 - 13 of their Opening Brief, Appellants, state:

> "Appellants have pursued getting their

inheritance continuously and rigorously since just after the death of Hoyt Sibley on December 20, 1997. On December 22, 1997, Appellants went to the Johnson law office to get their Trust and were told by DAVID JOHNSON that they had been disinherited. At that meeting, DAVID JOHNSON showed Appellants a stack of papers which he said were Trust amendments disinheriting them. Until that time, Appellants had no knowledge of the existence of any of these amendments. Indeed, on December 22, 1997, DAVID JOHNSON, would not allow Appellants to even read any of these documents and it was sometime later when they were finally able to read any disinheriting amendments. (2 A.A. 348-351.) On April 24, 1998, just a little more than four (4) months later, Appellants (therein Plaintiffs) filed their Complaint in which they sought restitution of their Trust from DAVID JOHNSON. (Please see the summary of that action as set out on pages 4 through 7 of DAVID JOHNSON's Objection .... 1 A.A. 138-141.)

Appellants/Petitioners have pursued this matter, even to the point of James Wray filing a Petition for Writ of Certiorari in the United States Supreme Court. (Found both at 2 A.A. 353-434 and at 3 A.A. 673-4 A.A. 754.) It was not until on or about July 10, 2003 that litigation in the local District Court matter concluded with the [notice of] entry of the final [July 9th] Order. On July 20 [Should read 30], 2003, Petitioners timely filed their Petition. (Please see the October, 2003 Affidavit of James Wray, 2 A.A. 348-351.) [The July 30, 2003 Petition is found at A.A. 001-116.]

...

At no time, have Appellants ever evidenced that they were through attempting to recover their inheritance from their mother. Indeed, both DAVID

JOHNSON and Mark Solomon, his attorney, are trust and estate specialists and both of them are very familiar with Probate Court and Probate Court proceedings to recover trust assets. It is inconceivable that either DAVID JOHNSON or Mark Solomon were surprised by the Petition filed by Appellants/Petitioners. Indeed, if DAVID JOHNSON and Mark Solomon had felt that they had a strong enough case to do so, they could have filed a Petition to Confirm the Trust and sought a trust interpretation favorable to them. (Please see the October, 2003 Affidavit of James Wray, 2 A.A. 348-351.)" [Emphasis is in the original.]

2. APPELLANTS HAVE DEMONSTRATED CONVERSION, THEFT, AND COLLUSION BY DAVID JOHNSON. BUT, THE COURT *MISSTATES* THAT LACHES IS APPROPRIATE BECAUSE "THE WRAYS ... FAIL TO ALLEGE ANY ACTUAL ATTEMPTED THEFT, COLLUSION OR CONVERSION BY THE [PURPORTED] TRUSTEE [DAVID JOHNSON]."

On pages 4 & 5 of its Order, the Nevada Supreme Court states:

"On appeal, the Wrays argue that the doctrine of laches does not bar their probate petition, and that respondent David Johnson is not entitled to laches as a defense to the probate petition due to unclean hands. Laches ... may be invoked when delay by one party works to the disadvantage of the other ... [Order at pg. 4.]

... The Wrays' charge of unclean hands against the trustee is an attempt to argue the underlying merits of their case; they fail to allege any actual attempted theft, collusion or conversion by the trustee.

In light of the above, we conclude that the

district court properly dismissed the petition based upon laches...." [Order at pg. 5.] [Emphasis added.]

The truth is, on pages 15 - 18 of the Opening Brief *[Reproduced at 90a.]*, and in the endnotes originating there, Appellants explain, in detail, why the acts of DAVID JOHNSON, in taking and keeping Appellants' Trust from them, are *conversion* as defined in Evans v. Dean Witter Reynolds, Inc., 116 Nev. 598, 610, 5 P.3d. 1043, 1050, 1051 (2000). As part of this explanation, it was necessary to prove that Appellants were actually the correct beneficiaries of their Trust. That is why it was necessary to discuss the provisions of Trust and Wills by which Appellants' mother and her husband *forbid* a change of beneficiaries once one of them had died.

Further, on pages 22 - 23 of the Reply Brief *[Reproduced at 96a.]*, Appellants demonstrate that DAVID JOHNSON's taking and keeping of Appellants' Trust from them is within the definition of ***theft***, as set out in NRS 205.0832.

In addition, on pages 18 - 20 of the Opening Brief *[Reproduced at 98a.]*, Appellants summarize the *collusion* of Nevada court system which: disregarded the law, misstated facts, and ignored issues in order to sanction the ***theft*** of Appellants' Trust by DAVID JOHNSON. [On page 21 of his Answering Brief, DAVID JOHNSON, acknowledges this argument, but fails to even attempt to contradict it.]

And, on page 3 of the Opening Brief, Appellants summarize how the Nevada Supreme Court ***"fixed"*** Appellants' earlier restitution, etc. case thereby benefitting DAVID JOHNSON.

Finally, on pages 18 - 19 of their Reply Brief, Appellants, show in detail why DAVID JOHNSON *is not even the valid trustee.*

3. THROUGHOUT ITS ORDER, THE COURT CONTINUALLY REFERS TO DAVID JOHNSON AS THE TRUSTEE AND *NEVER EVEN ACKNOWLEDGES* THAT

APPELLANTS HAVE DEMONSTRATED THAT THEY ARE THE CORRECT COTRUSTEES OF THEIR STOLEN TRUST AND DAVID JOHNSON IS NOT EVEN A VALID TRUSTEE.

Throughout its Order, the Court continually refers to DAVID JOHNSON as the trustee and never even acknowledges that Appellants have explained in detail in their Reply Brief at pages 18 - 19:

> *"Appellant And His Brother Are*
> *The Correct Cotrustees of The Trust*
> *and*
> *David Johnson Is Not Even a Valid Trustee.*
>
> 1) Pursuant to the May 2, 1991 Trust Amendment prepared by DAVID JOHNSON's firm and signed by Mary and Hoyt Sibley, Appellant and his brother were made Successor Cotrustees of the Trust. 1 A.A. 24-25. The May 2, 1991 Amendment was the final Amendment executed by both Mary Sibley and Hoyt Sibley, as Mary Sibley died July 28, 1991. 1 AA 113-116.
>
> 2) An identical Provision 4.3 is found in each of the Sibley's April 24, 1986 Wills which are part of the most important *overriding* body of the Sibley's April 24, 1986 in toto Amendment of the Trust. (The in toto Trust Amendment is found at 1 A.A. 27-57. Identical Provisions 4.3 are found at 1 A.A. 50 and 1 A.A. 55.) Identical Provisions 4.3 each read:
>
> "4.3 Residue: The residue of my estate shall be added to, administered and distributed as a part of the Trust named in ARTICLE III, according to the terms of said Trust and any amendments made thereto prior to my death. If the aforementioned Trust should fail or be revoked or

the foregoing bequest and devise should be inoperative for any reason, I give, devise, and bequeath such residue to the Trustee designated therein, and I direct said Trustee to divide, administer, hold and distribute the Trust Estate pursuant to the provisions of said Trust as such provisions exist at the time of such failure or revocation and in the same manner as though that certain trust were herein set forth in full." (Emphasis, except to the title, is added.)

Each of the 1986 Sibley Wills contains the same provisions that: "The residue of my estate shall be added to, administered and distributed as a part of the Trust ... according to the terms of said Trust and any amendments made thereto (to the Trust) prior to my death." Read together the identical Provisions 4.3 require that the subject residues be "added to" the Trust; be "administered" according to the Trust; and be "distributed" according to the terms of the Trust and any amendments to it made prior to the death of either spouse. Thus, both parties had agreed that they would not be able to amend *the Trust* after one of them died.

3) The Trust also contains Administrative Provision B.19 which reads:

"B.19 Conflict of Provisions: Except as provided in paragraph A.20 and other tax-relief provisions, in the event a provision in the body of this trust is in conflict with the General Provisions found in Exhibit A (trustee's Powers) and in this Exhibit B (Administrative Provisions), the provisions in the body of the trust shall apply." (Emphasis by bolding and enlarging added.) (1

A.A. 43.)

4) The only Trust Provision [purportedly] allowing the surviving spouse to amend the Trust to change a trustee or successor trustee is found within Administrative Provision B.23. (1 A.A. 44.) But, Administrative Provision B.23 is in conflict with, and thus overriding by, Will Provisions 4.3, supra, because Will Provisions 4.3 are in "body of the trust".

5) Thus, Appellant and his brother could not be removed as successor cotrustees after the death of their mother, Mary Sibley. Mary Sibley July 28, 1991. 1 AA 113-116.

6) By the invalid Trust Amendment dated May 20, 1992 (1 A.A. 90.) which was prepared by the Johnson law office, CHARLES JOHNSON was purportedly made successor trustee. By the invalid Trust Amendment dated September 26, 1995 (1 A.A. 83.) which was also prepared by the Johnson law office, CHARLES JOHNSON was made first successor trustee and DAVID JOHNSON was purportedly made second successor trustee. Both of these Amendments were invalid, pursuant to Will Provisions 4.3, supra, because they were made after Mary Sibley's death.

7) Thus, after the death of Trustee, Hoyt. Sibley, since DAVID JOHNSON was not even a valid Trustee, DAVID JOHNSON had:

A) No authority to administer the trust;

B) No authority to stand in the way of Appellants assuming their rightful positions as Cotrustees;

C) No authority to withhold the Trust,

and/or any information concerning Trust assets, from Appellant and his brother; and,

D) No standing to Object to Appellants' Probate Petition." [Emphasis as in the original.]

4. THE COURT *IGNORES* THE TRUST AND WILLS, AND THE LAW, AND *MISSTATES*:

A) THE SURVIVOR'S TRUST COULD BE AMENDED TO TAKE IT FROM APPELLANTS; AND,

B) THE DECEDENT'S TRUST COULD BE APPOINTED TO SOMEONE OTHER THAN APPELLANTS.

On pages 2 and 3 of its Order, the Nevada Supreme Court ignores the Trust and the Wills, and the law, and misstates:

"The trust provided that, upon the death of the first spouse, the trust was to be divided into two separate trusts, a "Survivor's Trust" and a "Decedent's Trust." **The Survivor's Trust remained fully revocable and amendable by the survivor until his or her death, leaving the survivor with the unfettered authority to amend the Survivor's Trust during his lifetime.** [10]

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[10] As is explained on pages 16 - 17 of the Opening Brief, the Sibleys' Identical Wills Provisions 4.3 [1 A.A. 50 & 55.] [found in the controlling body of the Trust] mandated that Trust distribution be made only according to the terms of the Trust and only those amendments made prior to the death of the first of them to die. Thus, Mr. Sibley could not alter any distribution from the Trust by means of any amendment after Mary Sibley died.

Further, Appellants have explained in detail, and with authority, in endnote 3 on pages 24 - 25 of the Opening Brief, that, in order to allow Mr. Sibley to take the marital deduction, and thus avoid estate tax after Mary Sibley's death, Mr. Sibley had to receive at least an unusable general power of appointment over the assets in the survivor's trust. In the Sibley Trust, B.23 (1 A.A. 44.) was that unuseable general power. B.23 was only

The Decedent's Trust was structured differently. This trust arrangement became irrevocable upon Mary Sibley's death, giving Mr. Sibley the enjoyment of the assets during his lifetime. Interestingly, the surviving spouse was given a special power of appointment as follows:

> The surviving spouse shall also have, with regard to the principal of the Decedent's Trust, the power to appoint said Trust, or any part thereof, either during life or by Will, to one or more persons or entities; provided, that this power may not be exercised to any extent in favor of the surviving spouse [or his or her creditors or the creditors of his or her estate]. [11]

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an "unuseable" power because, pursuant to B.19 (1 A.A. 43.), Trust provisions in the body of the Trust controlled over conflicting provisions in the Administrative Provisions and B.23 (1 A.A. 44.) was in the Administrative Provisions and Trust Provision 3.3 (1 A.A. 29.), which was in the controlling body of the Trust, mandated only joint exercise of any "... power to appoint or direct distributions from ..." the community property. Charles Johnson has testified that all the Sibley property was community. (1 A.A. 62.)

[11] Appellants have explained in detail, and with authority, in endnotes 4 & 5 on pages 25-27 of the Opening Brief that the "Special Power" [1 A.A. 31] ***was intentionally void***, as a power of appointment. But, that it was a tax planning device, ***containing IRS approved language***, to prevent the IRS from ruling that the Survivor had ownership or its equivalent, a general power, over the tax sheltered $600,000. Because, if there had been such a ruling, the estate would have been taxed on the $600,000. At that time, ***the exact unified credit amount*** then available under federal law ***was $600,000.*** Therefore, ***exactly $600,000 was assigned to the credit shelter trust*** which, in the Sibley Trust, was called the Decedent's Trust. What was thereby created was a limitation on the Survivors' power over the $600,000 sufficient to prevent a finding by the IRS that the Survivor had the equivalent of ownership in the $600,000,

The Sibleys executed the final joint amendment to the trust in May of 1991, shortly before Mrs. Sibley's death, under which James and David Wray were the named beneficiaries. Pursuant to her will executed April 24, 1986, she left the entire of her estate to the trust. After Mrs. Sibley died, Mr. Sibley amended the Survivor's Trust or exercised the special power of appointment of the Decedent's Trust several times. At the time of his death in 1997, provisions exercising the amended (sic) special power left the corpus of the Decedent's Trust to persons other than James and David." [Emphasis added.]

On pages 15 - 17 of Appellants' Opening Brief, they explain, in detail, that once Mary Sibley died, the trust became locked and Hoyt Sibley had no power to amend it, or use any

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while still allowing the Survivor to fully use the entire estate, including that portion of it protected by the $600,000 credit shelter trust. Confirming that the Sibley "Special Power" is void, is the following which is found on page 26 of the Opening Brief:

> " ...Comment d to § 320 of the First Restatement of Property provides: "... Powers to appoint to ... any person except the donee or his estate, ... are examples of group descriptions too broad to create a special power as here defined. ..." (Emphasis added.) Thus, the 4.5 Special Power in the Sibley Trust is void as it "appears" to grant the survivor power to appoint to any person except the surviving spouse, the estate of the surviving spouse or the creditors of the surviving spouse which is "too broad to create a special power."

For extensive other authority demonstrating that the "Special Power" is void, see 1 A.A. 197 - 202. *[Reproduced at 111a.]* For other authority showing that the "Special Power" was a tax avoidance device, see 1 A.A. 202 - 204. For proof that Mary Sibley understood the nature and use of the void "Special Power", as a tax avoidance device, see 1 A.A. 204 - 206.

power of appointment, to change the distribution away from Mary Sibley's sons, James and David Wray, since:

> " ... Pursuant to the "Sibley Trust" and the corresponding related Sibley Wills (all of which were written by DAVID JOHNSON's law firm) after the death of Mary Sibley, Hoyt Sibley was given complete use of all "Sibley Trust" assets for his lifetime, however, he was explicitly forbidden, by the terms of the Trust and Wills, from in any manner changing the beneficiaries because:
>
> A) Pursuant to Trust Provision 3.3 (1 A.A. 29), which was in the body of the Trust, Mary and Hoyt Sibley agreed that they could only jointly exercise any "... power to appoint or direct distributions from ..." the community property (E.N. #2 on pg. 23 *[Reproduced at 102a.]*) and all the Sibley property was community property. (E.N. #3 on pg 24 *[Reproduced at 103a.]*)
>
> B) The only Trust property not under the control of Trust Provision 3.3 (1 A.A. 29.) was the $600,000 put in the credit shelter trust (called decedent's trust in the Sibley Trust) to prevent the Trust from losing Mary Sibley's $600,000 tax exemption. (E.N. #4 on pg. 25 *[Reproduced at 107a.]*) Because Hoyt Sibley was given total use of the $600,000 during his lifetime, the Trust includes an intentionally void special power which only pertained to the $600,000. The intentionally void special power was included in the Trust because it contained IRS approved language to prevent the $600,000 from being taxed when the Trust was inherited by Mary Sibley's only children, the Appellants/Petitioners. (E.N. #5 on pg. 26 *[Reproduced at 108a.]*)

C) An identical Provision 4.3 is found in each of the Sibley's April 24, 1986 Wills which are part of the most important *overriding* body of the Sibley's April 24, 1986 in toto Amendment of the Trust. (The in toto Trust Amendment is found at 1 A.A. 27-57. Identical Provisions 4.3 are found at 1 A.A. 50 and 1 A.A. 55.) Identical Provisions 4.3 each read:

> "4.3 Residue: The residue of my estate shall be added to, administered and distributed as a part of the Trust named in ARTICLE III, according to the terms of said Trust and any amendments made thereto prior to my death. If the aforementioned Trust should fail or be revoked or the foregoing bequest and devise should be inoperative for any reason, I give, devise, and bequeath such residue to the Trustee designated therein, and I direct said Trustee to divide, administer, hold and distribute the Trust Estate pursuant to the provisions of said Trust as such provisions exist at the time of such failure or revocation and in the same manner as though that certain trust were herein set forth in full." (Emphasis, except to the title, is added.)

Each of the 1986 Sibley Wills contains the same provisions that: "The residue of my estate shall be added to, administered and distributed as a part of the Trust ... according to the terms of said Trust and any amendments made thereto (to the Trust) prior to my death." Read together the identical Provisions 4.3 require that the subject residues be "added to" the Trust; be "administered" according to the Trust; and be "distributed" according to the terms of the Trust and any amendments to it made prior to the death of either spouse. Thus, both parties had agreed that they

would not be able to amend *the Trust* after one of them died. Identical Provisions 4.3 conclude as follows:

> " ...If the aforementioned Trust should fail or be revoked or the foregoing bequest and devise should be inoperative for any reason, I give, devise, and bequeath such residue to the Trustee designated therein, and I direct said Trustee to divide, administer, hold and distribute the Trust Estate pursuant to the provisions of said Trust as such provisions exist at the time of such failure or revocation and in the same manner as though that certain trust were herein set forth in full." (Emphasis added.)

The above directive establishes that Mr. and Mrs. Sibley had agreed that neither of them would be able to make " the forgoing bequest or devise (of the residue of their estates which were to be mixed into the Trust) ...inoperative" after one of them died, as in the event of a 'failure or revocation" of the Trust or "the foregoing bequest ... becoming "inoperative for any reason", "the (entire)Trust Estate" is to be distributed in the manner that the provisions of the Trust directed "at the time of such failure or revocation" "as though that certain Trust were herein set forth in full." (E.N. #6 on pg. 27)" [Emphasis is as in the original.]

On page 5 of the Reply Brief, Appellants remind the Court:

> "... [N]owhere in his [Answering] Brief does DAVID JOHNSON even mention *[or try to contradict]* Trust Provision 3.3 (1 A.A. 29.) or Will Provisions 4.3 (1 A.A. 50 and 1 A.A. 55.). Both Trust Provision 3.3 and Will Provisions 4.3 are in the overriding body of

the Trust. DAVID JOHNSON has, indeed, totally failed to address ... *[any of the just quoted material from pages 15 to 17 of Appellants' Opening Brief]* ... " [Some emphasis is added.]

Endnote #6, on pages 27 - 28 of the Opening Brief, includes, but is not limited to, the follow:

> "In addition to the Trust and Will provisions, the following other evidence demonstrates that Appellants/Petitioners are the proper beneficiaries of the Sibley Trust:
>
> A) There is a type-written "agreement" from the Sibleys to the Sibleys' attorney, Charles Johnson, instructing him to prepare the May 2, 1991 Trust Amendment and what to put in that Amendment. This document also establishes that there was a contract between Mary and Hoyt Sibley because it is labeled: "Hoyt & Mary Sibley Trust Agreement." (Emphasis added.) This document is also important because it does not mention any powers of appointment or other powers allowing Hoyt Sibley to alter this binding "Agreement." Rather, using mandatory language "shall" and "to go to", it provides for the distribution of most of the Trust assets to Appellants/Petitioners JAMES and DAVID WRAY. (The "Trust Agreement" is found at 1 A.A. 92. Its authentication is at 1 A.A. 64.)
>
> B) In his affidavit, Mr. George Masko, Mary Sibley's brother, has stated:
>
> > "...1. That affiant is the brother of Mary Sibley, said sister having died on July 28, 1991, in Las Vegas, Nevada.
> >
> > 2. That on November 4, 1989, affiant, in

a private conversation with his sister, Mary Sibley dealing with education and the future distribution of estates, was told by Mary Sibley "When I go, everything I have will go to J.H. Wray and David." ... ..." (Emphasis added.) (1 A.A. 94-95.)

....

D) Lucille H. Masko, Mary Sibley's sister-in-law, states in her affidavit:

"...
From my knowledge of Mary M. Sibley I find that distribution of these assets in the trust to her only children, her sons: David and James Wray completely consistent with what Mary M. Sibley would have intended.
..." (Emphasis added.) (1 A.A. 102-105.) " [Emphasis is as in the original.]

5. IN ITS ORDER, THE SUPREME COURT CONTINUES TO GROSSLY *MISSTATE* THE FACTS OF THE PRIOR LAWSUIT, MOST IMPORTANTLY BY:

A) NOT ACKNOWLEDGING THE EXISTENCE OF THE RESTITUTION CLAIM IN THE PRIOR LAWSUIT;

B) MISSTATING THAT, IN THE PRIOR LAWSUIT, APPELLANTS ALLEGED DRAFTING ERRORS; WHEN INSTEAD, THE PRIOR LAWSUIT INCLUDED *NO* CLAIM FOR DRAFTING ERRORS; AND,

C) MISSTATING THAT IN THE PRIOR LAWSUIT, THE APPELLANTS ALLEGED THAT THE TRUST AS DRAFTED WAS CONTRARY TO THE INTENT OF THE SETTLORS; WHEN, INSTEAD, THE APPELLANTS HAVE ALWAYS CONTENDED THAT, PROPERLY INTERPRETED, THE SETTLORS' TRUST AND WILLS REFLECT THEIR

INTENTION TO LEAVE THEIR ESTATE PRIMARILY TO MARY SIBLEY'S SONS, THE APPELLANTS.

On page 3 of the Order, the Court misstates:

> "In 1998, the Wrays filed a malpractice and fraud action against the attorney that drafted the trust, and the attorney that served as trustee. The complaint alleged in part that the estate-planning attorney negligently drafted the special power of appointment in favor of the surviving spouse contrary to the intent of the settlors. The district court granted summary judgment in the matter on statute of limitations grounds and for lack of proof of fraud. Citing the fact that the Wrays became aware of the terms of the trust shortly after their mother's demise in 1991 and citing deficiencies of proof, [12] we finally affirmed via unpublished order on December 17, 2002." [Emphasis added.]

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[12] In its Dec. 17, 2002 Order, the Court misstated:

"A plaintiff in a civil fraud action must prove, among other things, justifiable reliance upon the defendant's misrepresentation. The Wrays allege that Charles Johnson committed fraud by lying in a pretrial deposition. The Wrays presented no evidence that they relied upon the alleged misrepresentation...." (2 A.A. 252-257. Quote on 255.)

The truth is:

"... Charles Johnson was charged with "fraud" ... (in the punitive damage claim, brought, in the Amended Complaint, pursuant to) NRS 42.005.... (The definition of fraud as used in NRS 42.005 is found in NRS 42.001.) There is no requirement in the definition of fraud in NRS 42.001, that a ... [defendant] rely upon the "fraud" all is required is "intentional misrepresentation, deception or concealment of a material fact known to the person with the intent to deprive another person of his rights or property or to otherwise injure another person." ..." (See the Dec. 31, 2002 Petition for Rehearing at 2A.A. 379-389 and 3 A.A. 699-709. Quote on 2 A.A. 387 and 3 A.A. 707.) [Emphasis is as in the original.] See the punitive damage claim at 1 A.A. 166-169.

The 1998 action was not merely a malpractice and fraud action. DAVID JOHNSON, himself, stated in his Answering Brief that in the prior lawsuit he was sued for restitution. DAVID JOHNSON stated:

> "...[T]he claims set forth in the later filed probate petition are identical to the issues which were previously raised ... in the prior lawsuit against David Johnson, the Trustee ... Similar to the prior lawsuit, the probate petition ... seeks an accounting ... , restitution and/or imposition of a constructive trust ... [DAVID JOHNSON's Answering Brief at page 1.]
>
> ...
>
> On April 24, 1998, Wray (along with his brother David Wray) filed a Complaint in the Eighth Judicial District Court against Charles Johnson and Charles Johnson and/or David Johnson, as Trustee of the Sibley Trust....1 A.A. 157-170... [DAVID JOHNSON's Answering Brief at page 3.]
>
> ...
>
> ... [I]n the prior lawsuit Wray litigated the issues of whether he and his brother they (sic) were entitled to an accounting of the Sibley Trust, restitution and/or the imposition of a constructive trust. ... 1 A.A. 166 It is the same issues Wray sought to have the District Court decide in the Probate Petition....1 A.A. 1-116 at 9-11..." [DAVID JOHNSON's Answering Brief at page 18.] [Emphasis added.]

Further, on page 3 of the Opening Brief, Appellants inform the Court:

> "In the previous action, Respondent (therein) DAVID JOHNSON always admitted he was never sued for malpractice, but only for restitution. 2 A.A. 293 -

294. Despite his admission, the Nevada Supreme Court fixed the restitution case by:

1) Never acknowledging the existence of the restitution issue, *for which there is no statute of limitations* period in Nevada within which a case must be filed;

2) Falsely stating that DAVID JOHNSON had been sued for legal malpractice; and,

3) Fabricating facts upon which it based its ruling that DAVID JOHNSON had been sued beyond the statute of limitations for legal malpractice.

...2 A.A. 379-389 and also 3 A.A. 699-709... 2 A.A. 389-399 and also 3 A.A. 709-719 "[Emphasis is in the original.]

Finally, Appellants *never sued for drafting errors* and Appellants have, at all times, contended that, properly interpreted, *the Trust and Wills reflect the Sibleys' intention to leave their estate primarily to Mary Sibley's sons, the Appellants*, as Appellants explain in their Reply Brief at pages 3 - 4:

"CORRECTION OF THE CERTAIN MAJOR MISSTATEMENTS IN DAVID JOHNSON'S STATEMENT OF THE CASE

On pages 3-4 of his Answering Brief, DAVID JOHNSON grossly misstates:

"... [In the prior lawsuit,] Wray alleged that Charles Johnson committed malpractice by negligently drafting the Sibley Trust to include a special power that allowed the surviving spouse ... to disinherit him ... contrary to the intent of, and agreement between, Hoyt and Mary Sibley. ... Based upon these allegations, Wray essentially sought relief consistent with his claim

that the special power of appointment could not be exercised by Hoyt Sibley to disinherit him ...: that is, Wray sought an accounting of the Sibley Trust , and restitution and a constructive trust over the Sibley Trust corpus consistent with the alleged true intent and agreement of the settlors...."

CHARLES JOHNSON WAS NOT SUED FOR DRAFTING ERRORS.

The truth is Charles [Johnson]son was not sued for drafting errors :

1) Paragraph 14 in both the Complaint and Amended Complaint (1 A.A. 159 and 1 A.A. 166, respectively) reads:

> "14. That Plaintiffs allege that they suffered damages as a result of the carelessness and negligence of the Defendant [Charles] Johnson and have suffered economic harm in excess of $10,000 and/or according to proof."

2) Charles Johnson testified, after consulting with his attorney, regarding the affirmative defense of statute of limitations:

> "A. As I understand, I am being sued for negligence. And inasmuch as no specific acts of negligence were alleged or the time when those alleged acts took place, the defense is just a catchall defense to cover whatever allegations might come out." (2 A.A. 344-346. Quote on 346.) [Emphasis added.]

3) Charles Johnson was sued for

allegations including, but not limited to: breach of his duty of loyalty to his client, Mary Sibley, when after the death of Mary Sibley, and without any written authorization for him to do so, he did engage in what had become a conflict of interest, as he aided Hoyt Sibley to completely undo the estate plan agreed to by Mary and Hoyt Sibley with the result that Plaintiffs were disinherited. (Please see the October, 2003 Affidavit of James Wray, which is found at 2 A.A. 348-351. Applicable part at 348-349.)

4) Although there is a drafting error allegation in ¶8 of both the Complaint and Amended Complaint, that allegation was purposely stated on information, but not on belief. The reason that ¶8 was written like this, by Petitioners' lawyer of that time, is that it was the position of the Defendants in the other case, that the Special Power allowed Petitioners to be disinherited. But, it was always the contention of Petitioners that the Special Power, when correctly interpreted, did not allow this and thus ¶8 of the Complaint had been written on information only. Although, ¶8 is a bit awkward, James Wray did not alter it in the Amended Complaint [*which added the punitive damage claim]* as Defendants understood what was meant as is evidenced by the deposition statement of Charles Johnson after conferring with his attorney. (Please see the October, 2003 Affidavit of James Wray, which is found at 2 A.A. 348-351. Applicable part at 349.)

APPELLANT HAS ALWAYS ALLEGED THAT CORRECTLY INTERPRETED THE SIBLEY TRUST AND WILLS DEMONSTRATE THAT HE AND HIS BROTHER COULD NOT BE DISINHERITED AFTER THEIR MOTHER'S DEATH.

DAVID JOHNSON correctly states on pages 3-4 of his Answering brief, that included within the Complaint and Amended Complaint were requests for restitution, an accounting, and a constructive trust. However, the manner in which he discusses these requests make it seem as if Appellant was, in that action, seeking restitution, based upon an allegation that the true intent of the Sibleys was different than what was stated in their Trust and joint Wills. THAT IS NOT CORRECT. Appellant has always alleged that, correctly interpreted, the Trust and Wills, accurately state the true intent of the Sibleys that the Trust could not be altered after Mary Sibley's death to disinherit Appellants. (Please see the October, 2003 Affidavit of James Wray, which is found at 2 A.A. 348-351.)" [The only emphasis which is added is the enlargement of Charles Johnson's ***acknowledgment that he was sued only for general negligence.***]

Submitted this 3rd day of January, 2006.

BY: s/ James Wray

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CERTIFICATE OF MAILING

I have this 3rd day of January, 2006, with proper postage attached, mailed a copy of the foregoing AMENDED PETITION FOR REHEARING to:

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s/ James Wray

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IN THE SUPREME COURT OF THE STATE OF NEVADA

In the Matter of the Inter Vivos Trust of: HOYT SIBLEY AND MARY M. SIBLEY1973 TRUST,	No. 42751
JAMES WRAY AND DAVID WRAY, (Proper) TRUSTEES OF THE HOYT SIBLEY AND MARY SIBLEY 1973 TRUST, Appellants, vs. DAVID JOHNSON, (Putative) TRUSTEE OF THE HOYT SIBLEY AND MARY SIBLEY 1973 TRUST, Respondent.	FILED JAN 18 2006 Janette M. Bloom Clerk of Supreme Court By_____ Chief Deputy Clerk

PETITION FOR EN BANC RECONSIDERATION OF APPELLANT JAMES WRAY, AS A RESULT OF THE ORDER DENYING REHEARING FILED ON JANUARY 12, 2006 AND THE ORDER OF AFFIRMANCE FILED ON DECEMBER 21, 2005

APPEAL FROM THE EIGHTH JUDICAL DISTRICT COURT DEPARTMENT XI (PROBATE), JUDGE MICHAEL L. DOUGLAS

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3. Appellants have demonstrated conversion, theft, and collusion by David Johnson. But, the Court *misstates* that laches is appropriate because "The Wrays ... fail to allege any actual attempted theft, collusion or conversion by the trustee." 3-4 [here: 55a-56a]

4. Throughout its Order, the Court continually refers to David Johnson as the Trustee and *never even acknowledges that Appellants have demonstrated that they are the correct Cotrustees of their stolen Trust and David Johnson is not even a valid Trustee.* 4-5 [here: 56a-59a]

5. The Court *ignores* the Trust and Wills, and the law, and *misstates:*

A) The Survivor's Trust could be amended to take it from Appellants; and,

B) The Decedent's Trust could be appointed to someone other than Appellants. 5-8 [here: 59a-65a]

6. In its Order, the Supreme Court continues to grossly *misstate* the facts of the prior lawsuit, most importantly by:

A) Not acknowledging the existence of the restitution claim in the prior lawsuit;

B) Misstating that, in the prior lawsuit, Appellants alleged drafting errors; when, instead, the prior lawsuit included *no* claim for drafting errors; and,

C) Misstating that in the prior lawsuit, the Appellants alleged that the Trust, as drafted, was contrary to the intent of the settlors; when, instead, the Appellants have always contended that, properly interpreted, the settlors' Trust and Wills reflect their intention to leave their estate primarily to Mary Sibley's sons, the Appellants.

8-10
[here: 65a-71a]

1. En Banc Reconsideration is absolutely called for under NRAP 40A.

Pursuant to NRAP 40A, Appellant James Wray requests En Banc Reconsideration as a result of the panel's Order Denying Rehearing, filed Jan. 12, 2006 [13] , and the panel's Order of Affirmance, filed Dec. 21, 2005 [Order]. The Order has the appearance of fraud in which the Supreme Court panel has multiple times:

1) Misstated the facts in Appellants' case;

2) Failed to address Appellants' relevant issues; and,

3) Failed to apply the applicable law [14] ;

all apparently intentionally done in an effort to allow Respondents to escape liability and to allow the theft from Appellants, of Appellants' inheritance from Appellants' mother.

The misdeeds of the panel:

1) Deny Appellants their inheritance without the due process required by the 14th Amendment to the United States Constitution [15] ;

---

[13] In its Jan. 12, 2006 Order, the Court does not dispute anything said in the Amended Petition for Rehearing.

[14] Cannon 3(2) of the Nevada Code of Judicial Conduct reads:

" A judge shall be faithful to the law* and maintain professional competence in it....." (Emphasis added.)

[15] Section 1 of the 14th Amendment to the United States Constitution reads:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the

2) Demonstrate blatant partiality by the Nevada Supreme Court;

3) Make Nevada a very hostile place for potential testators and their intended beneficiaries; and,

4) Confirm to Nevada trust and estate attorneys that they need not be honest or competent because they can count on the Nevada Supreme Court to, not only protect them from any consequences resulting from their dishonest or incompetent acts [16]; but to actually aid and abet them in the perpetration of dishonest acts.

The panel's Order is in conflict not only with all the precedents summarized in the remainder of this Petition, but also with the very large number of authorities cited in Appellants' briefs and appendix.

2. The Court *misstates* that Appellants' "...inaction

---

equal protection of the laws." (Emphasis by bolding plus underlining added.) [Opening Brief at pg. 18.]

Further, we have been cautioned, by United States Supreme Court Justice Anthony M. Kennedy:

"... Just recently, two justices of the United States Supreme Court spoke out against threats to judicial neutrality. One of those threats, according to Justice Anthony M. Kennedy, is campaign spending in state judicial elections. See Joan Biskupie, In Rare Appearances, 2 Justices Concur Against Threats to Neutrality, Wash. Post, December 6, 1998, available in 1998 WL 22539304. Justice Kennedy made a more impassioned point in summarizing his concerns: "The law makes a promise. The promise is neutrality. If that promise is broken, the law ceases to exist. All that's left is the dictate of a tyrant, or a mob." Dababnah v. West Virginia Bd. Of Medicine, 47 F. Supp.2d 734, 749 (S.D.W.Va. 1999) (Emphasis by bolding plus underlining added.) [Opening Brief at pg. 18.]

[16] Cannon 2B of the Nevada Code of Judicial Conduct reads: "A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. . ..." (Emphasis added.)

caused a material disadvantage..." to David Johnson. But, the Court refuses to acknowledge that:

A) Appellants filed their restitution action against David Johnson on April 24, 1998; and,

B) Appellants have maintained nearly constant litigation, to recover their stolen Trust, from David Johnson, up until the present.

On pages 4 - 5 of its Order, the Court distorts:

> "Here, nothing barred the Wrays from filing their petition in the probate forum in an action parallel to their 1998 malpractice/fraud action. Instead, without explanation, the Wrays waited until 2003, after a final order was entered in the previous case, to file the instant petition. While it may have made little sense to move to confirm the trust in 1991 because they were the beneficiaries, they could have filed their petition in December of 1997 after Mr. Sibley's death, ...
>
> Most tellingly, the Wrays's inaction caused a material disadvantage to both the trustee and the trust because the trust property had already been distributed to its multiple beneficiaries and now the trust cannot be restored to its former state.... [Emphasis added.]

The truth is, Appellants included a claim for restitution, of their Trust, within their April 24, 1998 lawsuit. Thus, Appellants' 1998 lawsuit fully alerted DAVID JOHNSON that Appellants contended that they were the rightful owners of their stolen Trust and they wanted it returned to them. [Opening Brief at pgs. 12 - 13. {Citing to 2 A.A. 348-351 & 1 A.A. 138-141}] DAVID JOHNSON, himself, states in his Answering Brief:

> "...[T]he claims set forth in the later filed probate petition are identical to the issues which were previously

raised ... in the prior lawsuit against David Johnson, the Trustee ... Similar to the prior lawsuit, the probate petition ... seeks an accounting ... , restitution and/or imposition of a constructive trust ... [DAVID JOHNSON's Answering Brief at page 1.]

...

On April 24, 1998, Wray (along with his brother David Wray) filed a Complaint in the Eighth Judicial District Court against Charles Johnson and Charles Johnson and/or David Johnson, as Trustee of the Sibley Trust....1 A.A. 157-170... [DAVID JOHNSON's Answering Brief at page 3.]

...

... [I]n the prior lawsuit Wray litigated the issues of whether he and his brother they (sic) were entitled to an accounting of the Sibley Trust, restitution and/or the imposition of a constructive trust. ... 1 A.A. 166 It is the same issues Wray sought to have the District Court decide in the Probate Petition....1 A.A. 1-116 at 9-11..." [DAVID JOHNSON's Answering Brief at page 18.] [Emphasis added.]

DAVID JOHNSON's own just quoted language, proves that Appellants sought restitution of their stolen Trust in their initial action filed April 24, 1998.

Finally, on pages 12 - 13 of their Opening Brief, Appellants, state:

"Appellants have pursued getting their inheritance continuously and rigorously since just after the death of Hoyt Sibley on December 20, 1997. On December 22, 1997, Appellants went to the Johnson law office to get their Trust and were told by DAVID JOHNSON that they had been disinherited. At that meeting, DAVID JOHNSON showed Appellants a stack of

papers which he said were Trust amendments disinheriting them. Until that time, Appellants had no knowledge of the existence of any of these amendments. Indeed, on December 22, 1997, DAVID JOHNSON, would not allow Appellants to even read any of these documents and it was sometime later when they were finally able to read any disinheriting amendments. (2 A.A. 348-351.) On April 24, 1998, just a little more than four (4) months later, Appellants (therein Plaintiffs) filed their Complaint in which they sought restitution of their Trust from DAVID JOHNSON. (Please see the summary of that action as set out on pages 4 through 7 of DAVID JOHNSON's Objection .... 1 A.A. 138-141.)

Appellants/Petitioners have pursued this matter, even to the point of James Wray filing a Petition for Writ of Certiorari in the United States Supreme Court. (Found both at 2 A.A. 353-434 and at 3 A.A. 673-4 A.A. 754.) It was not until on or about July 10, 2003 that litigation in the local District Court matter concluded with the [notice of] entry of the final [July 9th] Order. On July 20 [Should read 30], 2003, Petitioners timely filed their Petition. (Please see ... 2 A.A. 348-351.) [The July 30, 2003 Petition is found at 1 A.A. 001-116.]

...

At no time, have Appellants ever evidenced that they were through attempting to recover their inheritance from their mother. Indeed, both DAVID JOHNSON and Mark Solomon, his attorney, are trust and estate specialists and both of them are very familiar with Probate Court and Probate Court proceedings to recover trust assets. It is inconceivable that either DAVID JOHNSON or Mark Solomon were surprised by the Petition filed by Appellants/Petitioners. Indeed, if DAVID JOHNSON and Mark Solomon had felt that they had a strong enough case to do so, they could have filed

a Petition to Confirm the Trust and sought a trust interpretation favorable to them. (Please see ... 2 A.A. 348-351.)" [Emphasis to the word "restitution" is added.]

3. Appellants have demonstrated conversion, theft, and collusion by David Johnson. But, the Court *misstates* that laches is appropriate because "The Wrays ... fail to allege any actual attempted theft, collusion or conversion by the trustee."

On pages 4 & 5 of its Order, the Nevada Supreme Court states:

> "On appeal, the Wrays argue that the doctrine of laches does not bar their probate petition, and that respondent David Johnson is not entitled to laches as a defense to the probate petition due to unclean hands. Laches ... may be invoked when delay by one party works to the disadvantage of the other ... [Order at pg. 4.]
>
> ... The Wrays' charge of unclean hands against the trustee is an attempt to argue the underlying merits of their case; they fail to allege any actual attempted theft, collusion or conversion by the trustee.
>
> In light of the above, we conclude that the district court properly dismissed the petition based upon laches...." [Order at pg. 5.] [Emphasis added.]

The truth is, on pages 15 - 18 of the Opening Brief *[Reproduced at 90a.]*, and in the endnotes originating there, Appellants explain, in detail, why the acts of DAVID JOHNSON, in taking and keeping Appellants' Trust from them, are ***conversion*** as defined in Evans v. Dean Witter Reynolds, Inc., 116 Nev. 598, 610, 5 P.3d. 1043, 1050, 1051 (2000). As part of this explanation, it was necessary to prove that Appellants

were actually the correct beneficiaries of their Trust. That is why it was necessary to discuss the provisions of Trust and Wills by which Appellants' mother and her husband *forbid* a change of beneficiaries once one of them had died.

Further, on pages 22 - 23 of the Reply Brief *[Reproduced at 96a.]*, Appellants demonstrate that DAVID JOHNSON's taking and keeping of Appellants' Trust from them is within the definition of ***theft***, as set out in NRS 205.0832.

In addition, on pages 18 - 20 of the Opening Brief *[Reproduced at 98a.]*, Appellants summarize the ***collusion*** of the Nevada court system which: disregarded the law, misstated facts, and ignored issues in order to sanction the *theft* of Appellants' Trust by DAVID JOHNSON. [On page 21 of his Answering Brief, DAVID JOHNSON, acknowledges this argument, but fails to even attempt to contradict it.]

And, on page 3 of the Opening Brief, Appellants summarize how the Nevada Supreme Court *"fixed"* Appellants' earlier restitution, etc. case thereby benefitting DAVID JOHNSON.

Finally, on pages 18 - 19 of their Reply Brief, Appellants, show in detail why DAVID JOHNSON *is not even the valid trustee.*

4. Throughout its Order, the Court continually refers to David Johnson as the Trustee and *never even acknowledges that Appellants have demonstrated that they are the correct Cotrustees of their stolen Trust and David Johnson is not even a valid Trustee.*

Throughout its Order, the Court continually refers to DAVID JOHNSON as the trustee and never even acknowledges that Appellants have explained in detail in their Reply Brief at

pages 18 - 19:

"Appellant And His Brother Are
The Correct Cotrustees of The Trust
and
David Johnson Is Not Even a Valid Trustee.

1) Pursuant to the May 2, 1991 Trust Amendment prepared by DAVID JOHNSON's firm and signed by Mary and Hoyt Sibley, Appellant and his brother were made Successor Cotrustees of the Trust. 1 A.A. 24-25. The May 2, 1991 Amendment was the final Amendment executed by both Mary Sibley and Hoyt Sibley, as Mary Sibley died July 28, 1991. 1 AA 113-116.

2) An identical Provision 4.3 is found in each of the Sibley's April 24, 1986 Wills which are part of the most important *overriding* body of the Sibley's April 24, 1986 in toto Amendment of the Trust. (The in toto Trust Amendment is found at 1 A.A. 27-57. Identical Provisions 4.3 are found at 1 A.A. 50 and 1 A.A. 55.) Identical Provisions 4.3 each read:

> "4.3 Residue: The residue of my estate shall be added to, administered and distributed as a part of the Trust named in ARTICLE III, according to the terms of said Trust and any amendments made thereto prior to my death. If the aforementioned Trust should fail or be revoked or the foregoing bequest and devise should be inoperative for any reason, I give, devise, and bequeath such residue to the Trustee designated therein, and I direct said Trustee to divide, administer, hold and distribute the Trust Estate pursuant to the provisions of said Trust as such provisions exist at the time of such failure or revocation and in the same manner as though that certain trust were herein set forth in

full." (Emphasis, except to the title, is added.)

Each of the 1986 Sibley Wills contains the same provisions that: "The residue of my estate shall be added to, administered and distributed as a part of the Trust ... according to the terms of said Trust and any amendments made thereto (to the Trust) prior to my death." Read together the identical Provisions 4.3 require that the subject residues be "added to" the Trust; be "administered" according to the Trust; and be "distributed" according to the terms of the Trust and any amendments to it made prior to the death of either spouse. Thus, both parties had agreed that they would not be able to amend *the Trust* after one of them died.

3) The Trust also contains Administrative Provision B.19 which reads:

> "B.19 Conflict of Provisions: Except as provided in paragraph A.20 and other tax-relief provisions, **in the event a provision in the body of this trust is in conflict with the General Provisions found in Exhibit A (trustee's Powers) and in this Exhibit B (Administrative Provisions), the provisions in the body of the trust shall apply.**" (Emphasis by bolding and enlarging added.) (1 A.A. 43.)

4) The only Trust Provision [purportedly] allowing the surviving spouse to amend the Trust to change a trustee or successor trustee is found within Administrative Provision B.23. (1 A.A. 44.) But, **Administrative Provision B.23 is in conflict with, and thus overriding by, Will Provisions 4.3, supra, because Will Provisions 4.3 are in "body of the trust".**

5) Thus, Appellant and his brother could not be removed as successor cotrustees after the death of their mother, Mary Sibley. Mary Sibley July 28, 1991. 1 AA 113-116.

6) By the invalid Trust Amendment dated May 20, 1992 (1 A.A. 90.) which was prepared by the Johnson law office, CHARLES JOHNSON was purportedly made successor trustee. By the invalid Trust Amendment dated September 26, 1995 (1 A.A. 83.) which was also prepared by the Johnson law office, CHARLES JOHNSON was made first successor trustee and DAVID JOHNSON was purportedly made second successor trustee. Both of these Amendments were invalid, pursuant to Will Provisions 4.3, supra, because they were made after Mary Sibley's death.

7) Thus, after the death of Trustee, Hoyt Sibley, since DAVID JOHNSON was not even a valid Trustee, DAVID JOHNSON had:

A) No authority to administer the trust;

B) No authority to stand in the way of Appellants assuming their rightful positions as Cotrustees;

C) No authority to withhold the Trust, and/or any information concerning Trust assets, from Appellant and his brother; and,

D) No standing to Object to Appellants' Probate Petition." [Emphasis as in the original.]

5. The Court *ignores* the Trust and Wills, and the law, and *misstates:*

A) The Survivor's Trust could be amended to take it from Appellants; and,

B) The Decedent's Trust could be appointed to someone other than Appellants.

On pages 2 and 3 of its Order, the Nevada Supreme Court ignores the Trust and the Wills, and the law, and misstates:

> "The trust provided that, upon the death of the first spouse, the trust was to be divided into two separate trusts, a "Survivor's Trust" and a "Decedent's Trust." The Survivor's Trust remained fully revocable and amendable by the survivor until his or her death, leaving the survivor with the unfettered authority to amend the Survivor's Trust during his lifetime. [17] The Decedent's Trust was structured differently. This trust arrangement became irrevocable upon Mary Sibley's death, giving Mr. Sibley the enjoyment of the

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[17] As is explained on pages 16 - 17 of the Opening Brief, the Sibleys' Identical Wills Provisions 4.3 [1 A.A. 50 & 55.] [found in the controlling body of the Trust] mandated that Trust distribution be made only according to the terms of the Trust and only those amendments made prior to the death of the first of them to die. Thus, Mr. Sibley could not alter any distribution from the Trust by means of any amendment after Mary Sibley died.

Further, Appellants have explained in detail, and with authority, in endnote 3 on pages 24 - 25 of the Opening Brief, that, in order to allow Mr. Sibley to take the marital deduction, and thus avoid estate tax after Mary Sibley's death, Mr. Sibley had to receive at least an unusable general power of appointment over the assets in the Survivor's trust. In the Sibley Trust, B.23 (1 A.A. 44.) was that unuseable general power. B.23 was only an "unuseable" power because, pursuant to B.19 (1 A.A. 43.), Trust provisions in the body of the Trust controlled over conflicting provisions in the Administrative Provisions and B.23 (1 A.A. 44.) was in the Administrative Provisions and Trust Provision 3.3 (1 A.A. 29.), which was in the controlling body of the Trust, mandated only joint exercise of any "... power to appoint or direct distributions from ..." the community property. Charles Johnson has testified that all the Sibley property was community. (1 A.A. 62.) And, "Any community property transferred to the trust ...[remained] community property after its transfer....", pursuant to B 26 (1 A.A. 44-45), quoted on pg. 24 of the Opening Brief.

assets during his lifetime. Interestingly, the surviving spouse was given a special power of appointment as follows:

> The surviving spouse shall also have, with regard to the principal of the Decedent's Trust, the power to appoint said Trust, or any part thereof, either during life or by Will, to one or more persons or entities; provided, that this power may not be exercised to any extent in favor of the surviving spouse [or his or her creditors or the creditors of his or her estate]. [18]

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[18] *Even, DAVID JOHNSON's attorney, Mark Solomon, acknowledged* that *the exact unified credit amount* available under federal law, *when Mary Sibley died, was $600,000;* and, therefore, *exactly $600,000 [not Mary Sibley's much larger ½ interest in the trust] was assigned to the credit shelter trust* which, in the Sibley Trust, was *called the Decedent's Trust*. See Opening Brief at 26, citing to 1 A.A. 66-70. (See especially 1 A.A. 70.)

Appellants have explained in detail, and with authority, in endnotes 4 & 5, on pages 25-27 of the Opening Brief, that the "Special Power" [1 A.A. 31] *was intentionally void*, as a power of appointment. But, that it was a tax planning device, *containing IRS approved language*, to prevent the IRS from ruling that the survivor had ownership, or its equivalent, a general power, over the tax sheltered $600,000. Because, if there had been such a ruling, the estate would have been taxed on the $600,000. What was thereby created was a limitation on the survivors' power over the $600,000 sufficient to prevent a finding by the IRS that the survivor had the equivalent of ownership in the $600,000, while still allowing the survivor to fully use the entire estate, including that portion of it protected by the $600,000 credit shelter trust. Confirming that the Sibley "Special Power" is void, as a power of appointment, is the following, which is on page 26 of the Opening Brief:

> " ...Comment d to § 320 of the First Restatement of Property provides: "... Powers to appoint to ... any person except the donee [the surviving spouse] or his [or her] estate, ... are examples of group descriptions too broad to create a special power as here defined. ..." (Emphasis added.) Thus, the 4.5 Special

The Sibleys executed the final joint amendment to the trust in May of 1991, shortly before Mrs. Sibley's death, under which James and David Wray were the named beneficiaries. Pursuant to her will executed April 24, 1986, she left the entire of her estate to the trust. After Mrs. Sibley died, Mr. Sibley amended the Survivor's Trust or exercised the special power of appointment of the Decedent's Trust several times. At the time of his death in 1997, provisions exercising the amended (sic) special power left the corpus of the Decedent's Trust to persons other than James and David." [Emphasis added.]

On pages 15 - 17 of Appellants' Opening Brief, they explain, in detail, that once Mary Sibley died, the trust became locked and Hoyt Sibley had no power to amend it, or use any power of appointment, to change the distribution away from Mary Sibley's sons, James and David Wray, since:

> " ... Pursuant to the "Sibley Trust" and the corresponding related Sibley Wills (all of which were written by DAVID JOHNSON's law firm) after the death of Mary Sibley, Hoyt Sibley was given complete use of all "Sibley Trust" assets for his lifetime, however, he was explicitly forbidden, by the terms of the Trust

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Power in the Sibley Trust is void as it "appears" to grant the survivor power to appoint to any person except the surviving spouse, the estate of the surviving spouse or the creditors of the surviving spouse which is "too broad to create a special power."

For ***extensive*** other authority demonstrating that the "Special Power" is void, as a power of appointment, see 1 A.A. 197 - 202. *[Reproduced at 111a.]* For other authority showing that the "Special Power" was a tax avoidance device, see 1 A.A. 202 - 204. For proof that Mary Sibley understood the nature and use of the void "Special Power", as a tax avoidance device, see 1 A.A. 204 - 206.

and Wills, from in any manner changing the beneficiaries because:

A) Pursuant to Trust Provision 3.3 (1 A.A. 29), which was in the body of the Trust, Mary and Hoyt Sibley agreed that they could only jointly exercise any "... power to appoint or direct distributions from ..." the community property (E.N. #2 on pg. 23 *[Reproduced at 102a.]*) and all the Sibley property was community property. (E.N. #3 on pg 24 *[Reproduced at 103a.]*)

B) The only Trust property not under the control of Trust Provision 3.3 (1 A.A. 29.) was the $600,000 put in the credit shelter trust (called decedent's trust in the Sibley Trust) to prevent the Trust from losing Mary Sibley's $600,000 tax exemption. (E.N. #4 on pg. 25 *[Reproduced at 107a.]*) Because Hoyt Sibley was given total use of the $600,000 during his lifetime, the Trust includes an intentionally void special power which only pertained to the $600,000. The intentionally void special power was included in the Trust because it contained IRS approved language to prevent the $600,000 from being taxed when the Trust was inherited by Mary Sibley's only children, the Appellants/Petitioners. (E.N. #5 on pg. 26 *[Reproduced at 108a.]*)

C) An identical Provision 4.3 is found in each of the Sibley's April 24, 1986 Wills which are part of the most important *overriding* body of the Sibley's April 24, 1986 in toto Amendment of the Trust. (The in toto Trust Amendment is found at 1 A.A. 27-57. Identical Provisions 4.3 are found at 1 A.A. 50 and 1 A.A. 55.) Identical Provisions 4.3 each read:

"4.3 Residue: The residue of my estate shall be added to, administered and distributed as a part of the Trust named in ARTICLE III, according to the terms of said Trust and any amendments made thereto prior to my death. If the aforementioned Trust should fail or be revoked or the foregoing bequest and devise should be inoperative for any reason, I give, devise, and bequeath such residue to the Trustee designated therein, and I direct said Trustee to divide, administer, hold and distribute the Trust Estate pursuant to the provisions of said Trust as such provisions exist at the time of such failure or revocation and in the same manner as though that certain trust were herein set forth in full." (Emphasis, except to the title, is added.)

Each of the 1986 Sibley Wills contains the same provisions that: "The residue of my estate shall be added to, administered and distributed as a part of the Trust ... according to the terms of said Trust and any amendments made thereto (to the Trust) prior to my death." Read together the identical Provisions 4.3 require that the subject residues be "added to" the Trust; be "administered" according to the Trust; and be "distributed" according to the terms of the Trust and any amendments to it made prior to the death of either spouse. Thus, both parties had agreed that they would not be able to amend *the Trust* after one of them died. Identical Provisions 4.3 conclude as follows:

" ...If the aforementioned Trust should fail or be revoked or the foregoing bequest and devise should be inoperative for any reason, I give, devise, and bequeath such residue to the Trustee designated therein, and I direct said Trustee to divide, administer, hold and distribute the Trust

Estate pursuant to the provisions of said Trust as such provisions exist at the time of such failure or revocation and in the same manner as though that certain trust were herein set forth in full." (Emphasis added.)

The above directive establishes that Mr. and Mrs. Sibley had agreed that neither of them would be able to make " the forgoing bequest or devise (of the residue of their estates which were to be mixed into the Trust) ...inoperative" after one of them died, as in the event of a 'failure or revocation" of the Trust or "the foregoing bequest ... becoming "inoperative for any reason", "the (entire)Trust Estate" is to be distributed in the manner that the provisions of the Trust directed "at the time of such failure or revocation" "as though that certain Trust were herein set forth in full." (E.N. #6 on pg. 27)" [Emphasis is as in the original.]

On page 5 of the Reply Brief, Appellants remind the Court:

"... [N]owhere in his [Answering] Brief does DAVID JOHNSON even mention *[or try to contradict]* Trust Provision 3.3 (1 A.A. 29.) or Will Provisions 4.3 (1 A.A. 50 and 1 A.A. 55.). Both Trust Provision 3.3 and Will Provisions 4.3 are in the overriding body of the Trust. DAVID JOHNSON has, indeed, totally failed to address ... *[, in his Answering Brief, any of the just quoted material from pages 15 to 17 of Appellants' Opening Brief]* ... " [Some emphasis is added.]

6. In its Order, the Supreme Court continues to grossly *misstate* the facts of the prior lawsuit, most importantly by:

A) Not acknowledging the existence of the

restitution claim in the prior lawsuit;

B) Misstating that, in the prior lawsuit, Appellants alleged drafting errors; when, instead, the prior lawsuit included *no* claim for drafting errors; and,

C) Misstating that in the prior lawsuit, the Appellants alleged that the Trust, as drafted, was contrary to the intent of the settlors; when, instead, the Appellants have always contended that, properly interpreted, the settlors' Trust and Wills reflect their intention to leave their estate primarily to Mary Sibley's sons, the Appellants.

On page 3 of the Order, the Court misstates:

> "In 1998, the Wrays filed a malpractice and fraud action against the attorney that drafted the trust, and the attorney that served as trustee. The complaint alleged in part that the estate-planning attorney negligently drafted the special power of appointment in favor of the surviving spouse contrary to the intent of the settlors. The district court granted summary judgment in the matter on statute of limitations grounds and for lack of proof of fraud. Citing the fact that the Wrays became aware of the terms of the trust shortly after their mother's demise in 1991 and citing deficiencies of proof, [19] we finally affirmed via

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[19] In its Dec. 17, 2002 Order, the Court misstated:

"A plaintiff in a civil fraud action must prove, among other things, justifiable reliance upon the defendant's misrepresentation. The Wrays allege that Charles Johnson committed fraud by lying in a pretrial deposition. The Wrays presented no evidence that they relied upon the alleged misrepresentation...." (2 A.A. 252-257. Quote on 255.)

The truth is:

"... Charles Johnson was charged with "fraud" ... (in a punitive damage claim, brought, in the Amended Complaint, pursuant to) NRS 42.005.... (The definition of fraud as used in NRS 42.005 is found in NRS 42.001.) There is no requirement in the definition of fraud in NRS 42.001,

unpublished order on December 17, 2002." [Emphasis added.]

The 1998 action was not merely a malpractice and fraud action. DAVID JOHNSON, himself, stated in his Answering Brief that in the prior lawsuit he was sued for restitution. DAVID JOHNSON stated:

> "...[T]he claims set forth in the later filed probate petition are identical to the issues which were previously raised ... in the prior lawsuit against David Johnson, the Trustee ... Similar to the prior lawsuit, the probate petition ... seeks an accounting ... , restitution and/or imposition of a constructive trust ... [DAVID JOHNSON's Answering Brief at page 1.]
>
> ...
>
> On April 24, 1998, Wray (along with his brother David Wray) filed a Complaint in the Eighth Judicial District Court against Charles Johnson and Charles Johnson and/or David Johnson, as Trustee of the Sibley Trust....1 A.A. 157-170... [DAVID JOHNSON's Answering Brief at page 3.]
>
> ...
>
> ... [I]n the prior lawsuit Wray litigated the issues of whether he and his brother they (sic) were entitled to an accounting of the Sibley Trust, restitution and/or the imposition of a constructive trust. ... 1 A.A. 166 It is the same issues Wray sought to have the District Court decide in the Probate Petition....1 A.A. 1-116 at 9-11..."

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that a ... [defendant] rely upon the "fraud" all [that] is required is "intentional misrepresentation, deception or concealment of a material fact known to the person with the intent to deprive another person of his rights or property or to otherwise injure another person." ..." (See the Dec. 31, 2002 Petition for Rehearing at 2A.A. 379-389 and 3 A.A. 699-709. Quote on 2 A.A. 387 and 3 A.A. 707.) [Emphasis in the original.] See the punitive damage claim at 1 A.A. 166-169.

[DAVID JOHNSON's Answering Brief at page 18.] [Emphasis added.]

Further, on page 3 of the Opening Brief, Appellants inform the Court:

"In the previous action, Respondent (therein) DAVID JOHNSON always admitted he was never sued for malpractice, but only for restitution. 2 A.A. 293 - 294. Despite his admission, the Nevada Supreme Court fixed the restitution case by:

1) Never acknowledging the existence of the restitution issue, *for which there is no statute of limitations* period in Nevada within which a case must be filed;

2) Falsely stating that DAVID JOHNSON had been sued for legal malpractice; and,

3) Fabricating facts upon which it based its ruling that DAVID JOHNSON had been sued beyond the statute of limitations for legal malpractice.

...2 A.A. 379-389 and also 3 A.A. 699-709... 2 A.A. 389-399 and also 3 A.A. 709-719 "[Emphasis is in the original.]

Finally, Appellants *never sued for drafting errors* and Appellants have, at all times, contended that, properly interpreted, *the Trust and Wills reflect the Sibleys' intention to leave their estate primarily to Mary Sibley's sons, the Appellants*, as Appellants explain in their Reply Brief at pages 3 - 4:

"CORRECTION OF THE CERTAIN MAJOR MISSTATEMENTS IN DAVID JOHNSON'S STATEMENT OF THE CASE

On pages 3-4 of his Answering Brief, DAVID JOHNSON grossly misstates:

"... [In the prior lawsuit,] Wray alleged that Charles Johnson committed malpractice by negligently drafting the Sibley Trust to include a special power that allowed the surviving spouse ... to disinherit him ... contrary to the intent of, and agreement between, Hoyt and Mary Sibley. ... Based upon these allegations, Wray essentially sought relief consistent with his claim that the special power of appointment could not be exercised by Hoyt Sibley to disinherit him ...: that is, Wray sought an accounting of the Sibley Trust , and restitution and a constructive trust over the Sibley Trust corpus consistent with the alleged true intent and agreement of the settlors...."

CHARLES JOHNSON WAS NOT SUED FOR DRAFTING ERRORS.

The truth is Charles [Johnson]son was not sued for drafting errors :

1) Paragraph 14 in both the Complaint and Amended Complaint (1 A.A. 159 and 1 A.A. 166, respectively) reads:

> "14. That Plaintiffs allege that they suffered damages as a result of the carelessness and negligence of the Defendant [Charles] Johnson and have suffered economic harm in excess of $10,000 and/or according to proof."

2) Charles Johnson testified, after consulting with his attorney, regarding the affirmative defense of statute of limitations:

> "A. As I understand, I am being sued for negligence. And inasmuch as no specific

acts of negligence were alleged or the time when those alleged acts took place, the defense is just a catchall defense to cover whatever allegations might come out." (2 A.A. 344-346. Quote on 346.) [Emphasis added.]

3) Charles Johnson was sued for allegations including, but not limited to: breach of his duty of loyalty to his client, Mary Sibley, when after the death of Mary Sibley, and without any written authorization for him to do so, he did engage in what had become a conflict of interest, as he aided Hoyt Sibley to completely undo the estate plan agreed to by Mary and Hoyt Sibley with the result that Plaintiffs were disinherited. (Please see ... 2 A.A. 348-351. Applicable part at 348-349.)

4) Although there is a drafting error allegation in ¶8 of both the Complaint and Amended Complaint, that allegation was purposely stated on information, but not on belief. The reason that ¶8 was written like this, by Petitioners' lawyer of that time, is that it was the position of the Defendants in the other case, that the Special Power allowed Petitioners to be disinherited. But, it was always the contention of Petitioners that the Special Power, when correctly interpreted, did not allow this and thus ¶8 of the Complaint had been written on information only. Although, ¶8 is a bit awkward, James Wray did not alter it in the Amended Complaint [*which added the punitive damage claim]* as Defendants understood what was meant as is evidenced by the deposition statement of Charles Johnson after conferring with his attorney. (Please see ... 2 A.A. 348-351. Applicable part at 349.)

APPELLANT HAS ALWAYS ALLEGED THAT

CORRECTLY INTERPRETED THE SIBLEY TRUST AND WILLS DEMONSTRATE THAT HE AND HIS BROTHER COULD NOT BE DISINHERITED AFTER THEIR MOTHER'S DEATH.

DAVID JOHNSON correctly states on pages 3-4 of his Answering brief, that included within the Complaint and Amended Complaint were requests for restitution, an accounting, and a constructive trust. However, the manner in which he discusses these requests make it seem as if Appellant was, in that action, seeking restitution, based upon an allegation that the true intent of the Sibleys was different than what was stated in their Trust and joint Wills. THAT IS NOT CORRECT. Appellant has <u>always</u> alleged that, <u>correctly interpreted</u>, the Trust and Wills, accurately state the true intent of the Sibleys that the Trust could not be altered after Mary Sibley's death to disinherit Appellants. (Please see ... 2 A.A. 348-351.)" [The only emphasis which is added is the enlargement of Charles Johnson's ***acknowledgment that he was sued <u>only</u> for general negligence.***]

Submitted this 17th day of January, 2006.

BY: <u>s/James Wray</u>

JAMES WRAY, ESQ.
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(702) 433-4652
Attorney for Appellant, JAMES WRAY

CERTIFICATE OF MAILING

I have this 17th day of January, 2006, with proper postage attached, mailed a copy of the foregoing PETITION FOR EN BANC RECONSIDERATION to:

Mark Solomon, Esq.
Dana Dwiggins, Esq.
LIONEL, SAWYER & COLLINS
300 S. Fourth St., Suite 1700
Las Vegas, Nevada 89101
Attorneys for Respondent, David Johnson, (Putative) Trustee of the HOYT SIBLEY AND MARY SIBLEY 1973 TRUST

David Wray
618 Garden Place
Las Vegas, Nevada 89107
Appellant in Pro Per

Eighth Judicial District Court, Dept. #11, District Judge
Eighth Judicial District Court
200 Lewis Ave.
Las Vegas, Nevada 89155

Clark County Clerk
200 Lewis Ave.
Las Vegas, Nevada 89155

s/James Wray

JAMES WRAY, ESQ.
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(702) 433-4652
Attorney for Appellant, JAMES WRAY

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in an action brought against a judicial officer for an act or commission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. § 1257(a)

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specifically set up or claimed under the Constitution or the treaties or statute of, or commission held or authority exercised under the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Courts of Appeals.

Time-line [20] of the Wray v. Johnson Matter as of 2/25/06

December of 1965, Mary Wray, the mother of James and David Wray, married Mr. Hoyt Sibley. Working together, Mary and Hoyt Sibley built a sizeable estate.

About 1989, Mary Sibley became ill with the illness which eventually killed her and her health progressively deteriorated.

May 2, 1991, when both Mary Sibley and Hoyt Sibley realized that Mary Sibley was near death, they amended their Trust for the last time, together.

July 28, 1991, Mary Sibley died.

About August of 1991, Hoyt Sibley provided James and David Wray with a copy of the Trust and incorporated Wills, including the 5/2/91 amendment. Pursuant to the Wills and Trust as amended 5/2/91:

1) Mr. Sibley was to have all the Trust property for his lifetime.

2) At the time of Hoyt Sibley's death, Mary Sibley's only children, James and David Wray were to inherit almost all the property in the Trust and were to become Co-Trustees of their Trust.

3) Mr. Sibley was forbidden to change the beneficiaries of the Trust after Mary Sibley's death.

December 20, 1997, Hoyt Sibley died.

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[20] This is an accurate, but very incomplete, summary intended to only provide an overview of this matter. To gain more understanding, a reader should next read the briefs filed in Nevada Supreme Court Case No. 42751. Those briefs are found in pdf format on CDs being distributed by James Wray.

December 22, 1997, James and David Wray went into the law offices of Charles and David Johnson, as Charles Johnson had been the long time attorney for Mary and Hoyt Sibley and his office had prepared the Sibley's Trust and incorporated Wills. David Johnson, the son of Charles Johnson then:

1) Told James and David Wray that they had been totally disinherited.

2) Held up a handful of papers which he said were Trust Amendments disinheriting James and David Wray.

3) Refused, at that time, to even let them read any of these purported Amendments.

April 24, 1998, James and David Wray filed a Complaint against:

1) Charles Johnson for legal malpractice consisting of allegations of general negligence.

2) Charles and/or David Johnson for restitution of the Trust property.

February 26, 1999, Charles Johnson admitted in his deposition that He [Charles Johnson] had been sued for general negligence and then lied that:

1) Mary and Hoyt Sibley had only intended the 5/2/91 Trust Amendment to be effective if, they both were hit by a truck and killed coming out of his office or otherwise were killed together and needed someone to inherit their Trust property and otherwise the Sibleys intended that the Trust remain amendable after Mary Sibley's death.

2) He, Charles Johnson, did not recall the state of Mary Sibley's health on 5/2/91.

July 1, 1999, James Wray's attempt to ... compel discovery of the contents and location of assets, etc. in the trust

left to him and his brother by their mother was denied by corrupt Discovery Commissioner Thomas Bigger, even though James Wray provided the Commissioner points and authorities which showed he was entitled to that information. (The Recommendation was dated July 8, 1999, but the oral ruling was made July 1, 1999.)

July 6, 1999, James Wray filed an Amended Complaint which added a provision seeking punitive damages from Charles Johnson for fraud, as defined in NRS 42.001, for lying at his deposition in an attempt to deprived James and David Wray of their inheritance.

July 14, 1999, James Wray filed an Objection to the Recommendation of Discovery Commissioner that he could not discovery the contents and location of the assets, etc. in the trust setup by his mother for him and his brother.

August 4, 1999, District Court Judge Redmon signed an Order denying James Wray discovery of the contents and location of contents, etc. in the trust setup by his [James Wray's] mother. (The Order was filed August 6, 1999.)

September 9, 1999, District Court Judge Redmond, dismissed James and David Wray's case against Charles and David Johnson:

1) Alleging that it had been filed after a 2-4 year statute of limitations for legal malpractice; and,

2) Not even mentioning the restitution claim.

September 17, 1999, Notice of Entry of the 9/9/99 Order was served by mail and filed.

September 30, 1999, James Wray appealed.

October 20, 1999, David Wray appealed.

December 17, 2002, the Nevada Supreme Court filed an Order of Affirmance in which it fixed the case by:

1) Never acknowledging the existence of the restitution issue, *for which there is no statute of limitations* period in Nevada within which a case must be filed;

2) Falsely stating that DAVID JOHNSON had been sued for legal malpractice; and,

3) Fabricating facts upon which it based its ruling that Charles and DAVID JOHNSON had been sued beyond the statute of limitations for legal malpractice.

December 31, 2002, James Wray filed a Petition for Rehearing.

February 20, 2003, the Nevada Supreme Court filed an Order Denying Rehearing.

February 25, 2003, James Wray filed a Motion that the Nevada Supreme Court Correct its Fraudulent Orders.

March 3, 2003, David Johnson filed his Opposition to the Motion that the Nevada Supreme Court Correct its Fraudulent Orders in which he did not contradict anything said in the Motion.

March 4, 2003, Charles Johnson filed his Opposition to the Motion that the Nevada Supreme Court Correct its Fraudulent Orders in which he did not contradict anything said in the Motion.

March 31, 2003, the Nevada Supreme Court filed an Order Denying Motions and forbidding further filings in the case.

April 10, 2003, James Wray filed a Petition for Writ of Certiorari to the U.S. Supreme Court.

About May of 2003, both David and Charles Johnson filed Waivers of their rights to file Responses to the Petition for Writ of Certiorari.

June 16, 2003, the U.S. Supreme Court denied the Petition for Writ of Certiorari.

July 10, 2003, the final Notice of Entry of Order is filed in the Civil Action after its remittitur to the District Court.

July 30, 2003, James and David Wray filed a Probate Court Petition to Confirm the existence of the Trust and to confirm that they are the Proper Trustees.

September 24, 2003, David Johnson Objected to the Probate Petition. [No other person objected.]

December 29, 2003, an Order was filed in which District Court Judge Douglas denied the Petition to Confirm a Trust and the Proper Trustees on the grounds of res judicata and/or collateral estoppel and laches.

January 8, 2004, Notice of Entry of the 12/29/03 Order was filed.

February 2, 2004, James Wray timely appealed to the Nevada Supreme Court.

February 17, 2004, David Wray timely appealed to the Nevada Supreme Court.

May 17, 2004, James Wray filed his Opening Brief in Nev. S. Ct. Case No. 42751.

June 25, 2004, David Johnson filed a Motion to Extend the Time to File Answering Brief.

June 29, 2004, James Wray filed a Response and Motion which included the following:

"MOTION THAT THE NEVADA SUPREME COURT CORRECT
ITS INCORRECT AND BIAS APPEAL CAPTION

My brother, David Wray, and I are the correct Trustees of the Trust in question of which our mother was one of the two settlors. **Respondent David Johnson claims to be the Trustee based upon void amendments prepared, by his firm, after the death of our mother and despite clear Trust and Will provisions, agreed to by our mother and her husband and fellow settlor, forbidding such amendments.** That we are the correct "Trustees" and that David Johnson is not the correct "Trustee" has been:

A) Explained by me throughout the case below starting with my original document filed therein: the "Petition to Confirm a Trust and the Proper Trustees [21] , Interpret a Trust, for Declaratory Relief & for Injunctive Relief";

B) Explained in my Docketing Statement filed in this matter February 20, 2004; and

C) Stated in my caption to all filings in the Nevada Supreme Court in Case No. 42751.

Despite my explanations and representations, the Nevada Supreme Court has somehow determined to use a bias caption which lists David and me as merely "Appellants" and Respondent David Johnson as the Respondent and Trustee.. (Please see the attached Affidavit of James Wray and in particular paragraph 4

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[21] *Respondent David Johnson never filed any similar petition asking any court to determine that he is the correct Trustee of the subject Trust.* [This footnote was in the Motion.]

in it.)

I request the Nevada Supreme Court henceforth, to use a neutral caption not one that assigns to the Respondent a title which is properly that of Appellants. Therefore, I suggest that the Nevada Supreme Court in its captions list Appellants and Respondent as "alleged" Trustees."

July 28, 2004, David Johnson filed his Answering Brief in Nev. S. Ct. Case No. 42751.

August 20, 2004, James Wray filed his Reply Brief in Nev. S. Ct. Case No. 42751.

August 24, 2004, James Wray filed a Notice which includes the following:

"NOTICE THAT THE NEVADA SUPREME COURT HAS NOT YET ADDRESSED APPELLANT'S TOTALLY UNOPPOSED: MOTION THAT THE NEVADA SUPREME COURT CORRECT ITS INCORRECT AND BIAS APPEAL CAPTION"

"On June 29th, 2004, Appellant James Wray filed a Motion that the Nevada Supreme Court correct its incorrect and bias appeal caption. That Motion was served by mail on Respondent on June 28th, 2004. That Motion should be something that the Nevada Supreme Court quickly automatically grants, as it is totally unopposed by the Respondent and since NRAP 27 (a) reads:

"...Any party may file a response in opposition to a motion ... within seven (7) days after service of the motion, ..."

; the time to oppose the subject Motion has long ago expired. However, Appellant's subject Motion remains unaddressed by the Nevada Supreme Court and the Nevada Supreme Court has persisted in using its bias and incorrect caption."

September 10, 2004, James Wray filed a CD in case No. 42751 containing all the filings in that case, as of that date.

January 10, 2005, the Nevada Supreme Court denied James Wray's totally unopposed: MOTION THAT THE NEVADA SUPREME COURT CORRECT ITS INCORRECT AND BIAS APPEAL CAPTION, etc.

January 19, 2005, James Wray filed his "MOTION THAT THE NEVADA SUPREME COURT CORRECT ITS CORRUPT ORDER FILED JANUARY 10, 2005...."

January 25, 2005, David Johnson filed his "RESPONDENT'S RESPONSE TO MOTION THAT THE NEVADA SUPREME COURT CORRECT ITS CORRUPT ORDER FILED JANUARY 10, 2005 ..." in which David Johnson ***does not dispute anything*** said in James Wray's Motion.

January 31, 2005, James Wray filed his: "MOTION SEEKING PERMISSION TO FILE A REPLY TO RESPONDENT'S RESPONSE TO MOTION THAT THE NEVADA SUPREME COURT CORRECT ITS CORRUPT ORDER FILED JANUARY 10, 2005...."

April 5, 2005, the Nevada Supreme Court issued another of its blatantly corrupt Orders. In this Order, the Nevada Supreme Court denied everything James Wray requested in his January 19th Motion, denied James Wray's January 31st Motion to file a Reply, and threatened possible

sanctions if certain arguments were raised again. In its April 5, 2005 Order, the Nevada Supreme Court does not even attempt to dispute any of the following undisputed things said in my January 19, 2005 Motion:

1) A trust belonging to me and my brother was stolen with the help of the corrupt Nevada Supreme Court. [1/19/05 Motion at page 1.]

2) "JAMES and DAVID WRAY [WRAYS] are the correct beneficiaries of a Trust left them by their mother, Mary Sibley...." [1/19/05 Motion at page 3.]

3) "... The WRAYS are also the correct Trustees of the Trust. But, after Mary Sibley death, her attorneys, DAVID JOHNSON and his father CHARLES JOHNSON, stole the Trust by producing fraudulent documents making DAVID JOHNSON the Trustee...." [1/19/05 Motion at page 3.]

4) "Even DAVID JOHNSON does not deny that: the Nevada Supreme Court fixed the earlier restitution case by:

> 1) Never acknowledging the existence of the restitution issue, *for which there is no statute of limitations* period in Nevada within which a case must be filed;
>
> 2) Falsely stating that DAVID JOHNSON had been sued for legal malpractice; and,
>
> 3) Fabricating facts upon which it based its ruling that DAVID JOHNSON had been sued beyond the statute of limitations for legal malpractice...." [1/19/05 Motion at pg. 3.]

5) "... Indeed, DAVID JOHNSON specifically states that in the previous action he [DAVID JOHNSON] was sued for restitution. ..." [1/19/05 Motion at page 3.]

6) "Even DAVID JOHNSON does not deny that: the WRAYS have been deprived of their property, without due process of law, and have been denied the equal protection of the laws, in violation of Section 1 of the 14th Amendment to the United States Constitution when Nevada courts disregarded the law, ignored issues, and altered the facts, in order to sanction the theft of the WRAYS' property by certain entities favored by the courts...." [1/19/05 Motion at pgs. 3-4.]

7) "...[T]the reason why the Nevada Supreme Court has applied its bias and incorrect caption *[to the present probate case appeal]* designating Respondent David Johnson as "Trustee" of the stolen Trust and Appellants as merely "Appellants" is that the Nevada Supreme Court had already decided when it named the case that Respondent David Johnson would win, no matter what the facts and the law say. But, it creates a real problem for the CORRUPT Court if they acknowledge that, indeed, David Johnson has never been determined by any court to be the correct "Trustee" and further, he has never even filed a petition seeking such designation." [Footnote #9 on page 10 of 1/19/05 Motion.]

8) "In its January 10, 2005 Order[,] the Nevada Supreme Court, with no authority or discussion, ruled concerning Appellant's totally unopposed Motion that it correct its incorrect and bias appeal caption:

> "... Further, having considered James Wray's ... motion to modify the caption we deny that motion as well."" [1/19/05 Motion at pg. 8.]

9) The stolen trust is worth well in excess of $5,000,000.00. Thus, the thieves had and presumably still have ample money to pay bribes. [1/19/05 Motion at pg 3.]

December 21, 2005, the Nevada Supreme Court issued

a blatantly fraudulent Order of Affirmance of the District Court dismissal of Appellants's Probate Petition.

January 4, 2005, Appellant James Wray filed an Amended Petition for Rehearing in which he quotes from the Order of Affirmance and explains:

1. The Court *misstates* that Appellants' "...inaction caused a material disadvantage..." to David Johnson. But, the Court refuses to acknowledge that:

A) Appellants filed their restitution action against David Johnson on April 24, 1998; and,

B) Appellants have maintained nearly constant litigation, to recover their stolen Trust, from David Johnson, up until the present.

2. Appellants have demonstrated conversion, theft, and collusion by David Johnson. But, the Court *misstates* that laches is appropriate because "The Wrays ... fail to allege any actual attempted theft, collusion or conversion by the trustee."

3. Throughout its Order, the Court continually refers to David Johnson as the Trustee and ***never even acknowledges*** that *Appellants have demonstrated that they are the correct Cotrustees of their stolen Trust and* ***David Johnson is not even a valid Trustee.***

4. The Court *ignores* the Trust and Wills, and the law, and *misstates*:

A) the Survivor's Trust could be amended to take it from Appellants; and,

B) the Decedent's Trust could be appointed to someone other than Appellants.

5. In its Order, the Supreme Court continues to

grossly *misstate* the facts of the prior lawsuit, most importantly by:

A) **Not acknowledging** the existence of the **restitution claim** in the prior lawsuit;

B) **Misstating** that, in the prior lawsuit, Appellants alleged drafting errors; **when, instead, the prior lawsuit included *no* claim for drafting errors; and,**

C) **Misstating** that in the prior lawsuit, the Appellants alleged that the Trust as drafted was contrary to the intent of the settlors; **when, instead, the Appellants have always contended that, properly interpreted, the settlors' Trust and Wills reflect their intention to leave their estate primarily to Mary Sibley's sons, the Appellants.**

January 12, 2006, the Nevada Supreme Court filed an Order Denying Rehearing in which it does not contest anything said in the Amended Petition for Rehearing.

January 18, 2006, Appellant James Wray filed a Petition for En Banc Reconsideration.

February 1, 2006, the corrupt Nevada Supreme Court filed an Order Denying En Banc Reconsideration in which the court does [not] even attempt to contest anything said in the Petition for En Banc Reconsideration.

AFFIDAVIT OF JAMES WRAY
IN VERIFICATION OF THE ACCURACY OF
THE FOREGOING TIME-LINE

STATE OF NEVADA)
)SS
CLARK OF COUNTY)

COMES NOW, JAMES WRAY, first being duly sworn,

and deposes and says, under penalty of perjury, in verification of the accuracy of the foregoing time-line:

1. I am one of the Appellants in the two appeals described in the time-line. I am also a licenced attorney in good standing but on inactive status. I have prepared all of the Appellants' briefs, the appendix, and all of the items filed in this matter on my behalf in both of the above described appeals. I also prepared all of the documents filed by me in the probate proceeding before the district court and most of such documents filed in the preceding civil action. Mary Sibley was my mother and I was raised by her. I am thus very familiar with the facts and law discussed in the time-line.

2. I have also written the foregoing time-line.

3. Based upon my knowledge of the facts and law relevant to this matter, and upon my knowledge of what is said in the time-line, I attest that, with the possible exception of some typographical sort of error, of which I am not now aware, the foregoing time-line is totally accurate as a summary of what the time-line describes.

s/James Wray
JAMES WRAY

SUBSCRIBED AND SWORN to and before me
this 25th day of February, 2006

s/Winifred Hodges
NOTARY PUBLIC in and for said:

COUNTY OF CLARK
and
STATE OF NEVADA

My Appointment No.: 05-99931-1

My Commission Expires: 8/30/09

Winifred Hodges
Notary Public
State of Nevada
Date Appointment expires-08/30/2009
Certificate No. 05-99931-1

QUOTE FROM PAGES 15-18 OF THE OPENING BRIEF DEMONSTRATING THAT DAVID JOHNSON HAS COMMITTED "CONVERSION" OF THE TRUST.

> "2-E. RESPONDENT DAVID JOHNSON DOES NOT HAVE CLEAN HANDS AND THUS IS NOT EVEN ENTITLED TO SEEK THE EQUITABLE REMEDY OF LACHES.

Finally, DAVID JOHNSON is not even eligible to seek the equitable remedy of laches, as DAVID JOHNSON, has "unclean hands" for acts including but not limited to the conversion of Appellants'/Petitioners' Trust property. The Nevada Supreme Court instructs us that:

> "Conversion is "a distinct act of dominion wrongfully exerted over another's personal property in denial of, or inconsistent with his title or rights therein or in derogation, exclusion, or defiance of such title or rights." Wantz v. Redfield, 74 Nev. 196, 198, 326 P.2d 413, 414 (1958). Further, conversion is an act of general intent, which does not require wrongful intent and is not excused by care, good faith, or lack of knowledge. See id.; Bader v. Cerri, 96 Nev. 352, 357 n.1, 609 P.2d 314, 317 n.1 (1980). ... Evans v. Dean Witter Reynolds, Inc., 116 Nev. 598, 606, 5 P.3d. 1043, 1048 (2000)
>
> ...
>
> "... Under the maxim that one seeking equity may not do so with "unclean hands," an intentional tortfeasor by definition seeks such relief from a position of ineligibility for it. *See Shelton*, 101 P.2d at 974." Evans v. Dean Witter Reynolds, Inc., 116 Nev. 598, 610, 5 P.3d. 1043, 1050, 1051 (2000)

The following events, demonstrate that DAVID JOHNSON, has

knowingly converted Appellants'/Petitioners' Trust:

1) Pursuant to the May 2, 1991 Trust Amendment prepared by DAVID JOHNSON's firm and signed by Mary and Hoyt Sibley, Appellants/Petitioners were to inherit almost all Trust property. 1 A.A. 24-25. The May 2, 1991 Amendment was the final Amendment executed by both Mary Sibley and Hoyt Sibley, as Mary Sibley died July 28, 1991. 1 AA 113-116.

2) Pursuant to the "Sibley Trust" and the corresponding related Sibley Wills (all of which were written by DAVID JOHNSON's law firm) after the death of Mary Sibley, Hoyt Sibley was given complete use of all "Sibley Trust" assets for his lifetime, however, he was explicitly forbidden, by the terms of the Trust and Wills, from in any manner changing the beneficiaries because:

A) Pursuant to Trust Provision 3.3 (1 A.A. 29), which was in the body of the Trust, Mary and Hoyt Sibley agreed that they could only jointly exercise any "... power to appoint or direct distributions from ..." the community property (E.N. #2 on pg. 23 *[Reproduced at 102a.]*) and all the Sibley property was community property. (E.N. #3 on pg 24 *[Reproduced at 103a.]*)

B) The only Trust property not under the control of Trust Provision 3.3 (1 A.A. 29.) was the $600,000 put in the credit shelter trust (called decedent's trust in the Sibley Trust) to prevent the Trust from losing Mary Sibley's $600,000 tax exemption. (E.N. #4 on pg. 25 *[Reproduced at 107a.]*) Because Hoyt Sibley was given total use of the $600,000 during his lifetime, the Trust includes an intentionally void special power which only pertained to the $600,000. The intentionally void special power was included in the Trust because it contained IRS approved language to prevent the $600,000 from being taxed when the Trust was inherited by

Mary Sibley's only children, the Appellants/Petitioners. (E.N. #5 on pg. 26 *[Reproduced at 108a.]*)

C) An identical Provision 4.3 is found in each of the Sibley's April 24, 1986 Wills which are part of the most important *overriding* body of the Sibley's April 24, 1986 in toto Amendment of the Trust. (The in toto Trust Amendment is found at 1 A.A. 27-57. Identical Provisions 4.3 are found at 1 A.A. 50 and 1 A.A. 55.) Identical Provisions 4.3 each read:

> "4.3 Residue: The residue of my estate shall be added to, administered and distributed as a part of the Trust named in ARTICLE III, according to the terms of said Trust and any amendments made thereto prior to my death. If the aforementioned Trust should fail or be revoked or the foregoing bequest and devise should be inoperative for any reason, I give, devise, and bequeath such residue to the Trustee designated therein, and I direct said Trustee to divide, administer, hold and distribute the Trust Estate pursuant to the provisions of said Trust as such provisions exist at the time of such failure or revocation and in the same manner as though that certain trust were herein set forth in full." (Emphasis, except to the title, is added.)

Each of the 1986 Sibley Wills contains the same provisions that: "The residue of my estate shall be added to, administered and distributed as a part of the Trust ... according to the terms of said Trust and any amendments made thereto (to the Trust) prior to my death." Read together the identical Provisions 4.3 require that the subject residues be "added to" the Trust; be "administered" according to the Trust; and be "distributed" according to the terms of the Trust and any amendments to it made prior to the death of either spouse. Thus, both parties had agreed that

they would not be able to amend *the Trust* after one of them died. Identical Provisions 4.3 conclude as follows:

> " ...If the aforementioned Trust should fail or be revoked or the foregoing bequest and devise should be inoperative for any reason, I give, devise, and bequeath such residue to the Trustee designated therein, and I direct said Trustee to divide, administer, hold and distribute the Trust Estate pursuant to the provisions of said Trust as such provisions exist at the time of such failure or revocation and in the same manner as though that certain trust were herein set forth in full." (Emphasis added.)

The above directive establishes that Mr. and Mrs. Sibley had agreed that neither of them would be able to make " the forgoing bequest or devise (of the residue of their estates which were to be mixed into the Trust) ...inoperative" after one of them died, as in the event of a 'failure or revocation" of the Trust or "the foregoing bequest ... becoming "inoperative for any reason", "the (entire)Trust Estate" is to be distributed in the manner that the provisions of the Trust directed "at the time of such failure or revocation" "as though that certain Trust were herein set forth in full." (E.N. #6 on pg. 27 *[Omitted from App. version.]*)

Following Mary Sibley's death, the Johnson law firm first attempted to probate a superceded version of Mary Sibley's Will, and only when caught, probated the correct one. (2 A.A. 438-446; 3 A.A. 616-617 and 642.) Under the superceded version of Mary Sibley's Will dated April 19, 1973, Mr. Sibley's powers to change the subject distribution were much less restricted than they were under Provision 4.3 of the Wills dated April 24, 1986. The 1986 elimination of Mr. Sibley's powers to change the Trust after Mary's death also

demonstrates that there was an agreement and contract between the Sibleys that their Trust was not to be amended once one of them died. The residue provision in Mrs. Sibley's superceded April 19, 1973 Will read:

> "FIFTH: I give the residue of my estate, excluding property over which I have a power of appointment, to my husband and any successor in trust as Trustee of the trust designated as "HOYT SIBLEY and MARY M. SIBLEY 1973 TRUSTS," established earlier this day and bearing the same date as this Will, of which my husband HOYT and I are the Settlors, and I direct that the residue of my estate shall be added to, administered and distributed as a part of that trust, according to the terms of that trust on the date of my death, giving effect to any amendments made to it prior to the date of my death, **and any amendments thereafter made in accordance with the terms of that trust by the exercise of a power of amendment, appointment, withdrawal, or otherwise**.
>
> ..." (Emphasis by bolding plus underlining is added.) (The "FIFTH" provisions to Mary and Hoyt Sibley's superceded 4/19/73 wills are found, respectively at 1 A.A. 73 and 77.)

3) Despite the above discussed Sibley Trust and Will provisions which were written by his firm, DAVID JOHNSON, has not only kept the Appellants/Petitioners from obtaining their inheritance, **he has given it to other people**. (Please see page 12 of DAVID JOHNSON's Objection ... where he admits this. 1 A.A. 146.)

4) DAVID JOHNSON has **wrongly prevented Appellants/Petitioners from even obtaining discovery of the total assets** (E.N. #7 on pg. 29 *[Omitted from App. version.]*) **which were in their Trust**. Please see Argument #9 found on

pages 25-27 in the Opening Brief filed in the previous restitution case (1 A.A. 209-211.) and note that none of the authorities relied upon in this argument even appear in the table of authorities (2 A.A. 266-269.) for DAVID JOHNSON's Answering Brief (2 A.A. 263-310.) , thus proving that while he was somehow able to corrupt the lower court to prevent the discovery properly sought by Appellants (therein Plaintiffs) in the earlier case, he, indeed, had no legal basis to do so."

QUOTE FROM PAGES 22-23 OF THE REPLY BRIEF DEMONSTRATING THAT DAVID JOHNSON HAS COMMITTED "THEFT" OF THE TRUST.

"Because DAVID JOHNSON definitely knows what is in the Trust and Will Provisions his office prepared for the Sibley's, and, because he, therefore, must know that Appellant and his brother were entitled to the majority of the Trust assets and to assume control of the Trust as Cotrustees, at the time of Hoyt Sibley;'s death, DAVID JOHNSON also is guilty of "theft" as it is defined as follows:

"NRS 205.0832 Actions which constitute theft.

1. Except as otherwise provided in subsection 2, a person commits theft if, without lawful authority, he knowingly:

(a) Controls any property of another person with the intent to deprive that person of the property

(b) Converts, makes an unauthorized transfer of an interest in, or without authorization controls any property of another person, or uses the services or property of another person entrusted to him or placed in his possession for a limited, authorized period of determined or prescribed duration or for a limited use.

(c) Obtains real, personal or intangible property or the services of another person by a material misrepresentation with intent to deprive that person of the property or services. As used in this paragraph, "material misrepresentation" means the use of any pretense, or the making of any promise, representation or statement of present, past or future fact which is fraudulent and which, when used or made, is instrumental in causing the wrongful control or transfer of property or services. The pretense may be verbal or it may be a physical act.

...

(e) Controls property of another person knowing or having reason to know that the property was stolen.

..."

Further, DAVID JOHNSON was not entitled to deny Appellant information concerning the assets in his trust, because:

1) As shown, earlier, at pages 5-7 and pages 18-19, Appellant and his brother are the correct major beneficiaries of the Trust and its correct Cotrustees; and,

2) As demonstrated, earlier, on pages 18 - 19, DAVID JOHNSON is <u>not even</u> a valid Trustee of Appellants' <u>stolen trust</u>."

QUOTE FROM PAGES 18-20 OF THE OPENING BRIEF DEMONSTRATING THAT THE NEVADA COURTS HAVE COLLUDED WITH DAVID JOHNSON IN SANCTIONING THE THEFT OF THE TRUST.

"3. APPELLANTS HAVE BEEN DEPRIVED OF THEIR PROPERTY, WITHOUT DUE PROCESS OF LAW AND HAVE BEEN DENIED THE EQUAL PROTECTION OF THE LAWS IN VIOLATION OF SECTION 1 OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN NEVADA COURTS DISREGARDED THE LAW, IGNORED ISSUES, AND ALTERED THE FACTS IN ORDER TO SANCTION THE THEFT OF APPELLANTS' PROPERTY BY CERTAIN ENTITIES FAVORED BY THE COURTS.

The Order of the District Court, filed December 29, 2003 by which the Court sanctions the theft of Appellants'/Petitioners' Trust left to them by their mother is grossly incorrect. Further the subject Order and the proceedings of the District Court which gave rise to it are grossly bias and thus in violation of Section 1 of the 14th Amendment to the United States Constitution which reads:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities ... [of] citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis by bolding plus underlining added.)

We have been cautioned, by United States Supreme Court Justice Anthony M. Kennedy:

> "... Just recently, two justices of the United States Supreme Court spoke out against threats to judicial neutrality. One of those threats, according to Justice Anthony M. Kennedy, is campaign spending in state judicial elections. See Joan Biskupie, In Rare Appearances, 2 Justices Concur Against Threats to Neutrality, Wash. Post, December 6,, 1998, available in 1998 WL 22539304. Justice Kennedy made a more impassioned point in summarizing his concerns: "**The law makes a promise. The promise is neutrality. If that promise is broken, the law ceases to exist. All that's left is the dictate of a tyrant, or a mob.**" Dababnah v. West Virginia Bd. Of Medicine, 47 F. Supp.2d 734, 749 (S.D.W.Va. 1999) (Emphasis by bolding plus underlining added.)

The corruption of then ... Chief Judge Douglas, then a candidate running for election to the Nevada Supreme Court and now an appointed "Justice" of the Nevada Supreme Court, is demonstrated in particular in:

1) The Reporter's Transcript of the November 20, 2003 Hearing filed December 9, 2003 (3 A.A. 519-564.) in which:

A) Despite detailed briefing to the contrary, the Court falsely alleges that the Trust allowed Appellants/Petitioners to be disinherited from their mother's estate after her death (pg. 3 line 19 -pg. 5 line 4);

B) The Court is shown that the briefing established that the Trust and Wills do not allow the disinheritance of Appellants/Petitioners after their mother's death (pg. 5 line 5-pg. 14 line 22 & pg. 17 line 8-line 10 & pg. 42 line 18-pg. 45 line 4);

C) The Court is shown that the briefing

established that res judicata and collateral estoppel do not prevent Appellants/Petitioners from bringing their PETITION ... to claim their inheritance. (pg. 17 line 9-pg. 24 line 14 & pg. 29 line 2- pg.32 line 7);

D) The Court, on its own, finds and applies two (2) inapplicable statutes of limitations to terminate Appellants'/Petitioners' attempt to recover their stolen Trust (pg. 32 line 8-pg. 34 line 23 & pg. 38 line 19-pg. 41 line 7 & especially pg. 41 line 21 -pg. 42 line 12 & pg. 45 line 1 - pg. 46 line 8);

E) The Court acquiesces when Mr. Solomon, who knows that there is no applicable statute of limitations and thus did not raise this argument, requests that the order also be based upon laches (pg. 46 line 9-line 10).

2) The unopposed Noticed Supplemental Communication filed December 1, 2003 (3 A.A. 505-518.) in which Appellant/Petitioner James Wray shows the Court that neither any statutes of limitations nor laches bars Appellants/Petitioners probate proceeding to recover their stolen Trust; and,

3) The December 29, 2003 Order (3 A.A. 565-566.) in which the Court signs an order prepared by Mr. Solomon, etc. barring Appellants's/Petitioners' PETITION ... on grounds of res judicata and/or collateral estoppel and laches.

The bias and blatant fraud of the corrupt Nevada Supreme Court "Justices" in related combined Appeals Nos. 34914 and 35027 are demonstrated in James Wray's Petition for Writ of Certiorari to the United States Supreme Court No. 02-1496. (Found both at 2 A.A. 353-434 and 3 A.A. 673-4 A.A. 754.)

The Nev. Attorney General. & Comm. on Judicial Discipline, have been informed of the fraud of the Nevada Supreme Court "Justices" (2 A.A. 395-397 and also at 3 A.A 715-717.) (E.N. #8 on pg. 29 *[Omitted from App. version.]*) and the AG and Commission have obviously declined their duty to enforce the law since those persons breaking the law are the "Justices" of Nevada Supreme Court.

The bias and prejudice of the corrupt district court in former district court case 98-A-387472-C are demonstrated in James Wray's Opening Brief in his Nevada Supreme Court Appeal No. 34914. 1 A.A. 176-246. As two easy to verify examples, please note that in DAVID JOHNSON's Answering Brief in that prior Appeal (2 A.A. 263- 310) and in particular his easy to check table of authorities to it (2 A.A. 266-269) DAVID JOHNSON does not even mention any of the authorities which James Wray cited in his arguments that:

1) The district court improperly denied him discover of concerning the assets in his Trust (Argument #9 found at 1 A.A. 209 to 211); or,

2) The district court was blatantly bias (Argument #13 found at 1 A.A. 220-221).

Indeed, the "Justices" of the Nevada Supreme Court can certainly take judicial notice of the fact that the Nevada Court System is corrupt and strongly bias in favor of powerful Nevada law firms and entities and that Nevada Courts misstate facts, ignore issues, and disregard the law in order to allow certain favored entities to prevail."

QUOTE OF ENDNOTE #2 FROM PG. 23 OF THE OPENING BRIEF, CONSISTING OF IMPORTANT TRUST PROVISION 3.3 WHICH MANDATES ONLY JOINT US OF ANY POWER TO APPOINT OR DIRECT DISTRIBUTION FROM THE COMMUNITY PORTION OF THE TRUST ESTATE.

"Section 3.3 states:

> "3.3 General Power of Appointment: The Settlors shall also have the general power to appoint or direct distributions from the Trust Estate, or any part thereof, either during life or by will, to any one or more persons or entities. This power shall be exercised jointly with respect to community property, and may be exercised individually with respect to separate property." (Emphasis ... added.) (1 A.A. 29.)"

QUOTE OF ENDNOTE #3 FROM PGS. 24-25 OF THE OPENING BRIEF, CONSISTING OF THE TRUST PROVISIONS NECESSARY TO ENABLE USE OF THE MARITAL DEDUCTION BY HOYT SIBLEY, WITHOUT ALLOWING A CHANGE OF BENEFICIARIES AFTER THE DEATH OF MARY SIBLEY.

"In his deposition of February 26, 1999, from page 13 line 19 through line 25, the drafter of the Trust and the attorney for Mr and Mrs. Sibley, CHARLES JOHNSON tells us that Mr. and Mrs. Sibley held all of their property as community property. (1 A.A. 62.) Property which was put into the Trust as community property remained so pursuant to Trust provision B.26 which provides:

> "B.26 Community and Separate Property: Any community property transferred to the trust shall remain community property after its transfer. ..." (Emphasis by bolding added.) (1 A.A. 44-45.)

In order to qualify the survivor to receive a marital deduction, the survivor could have received the survivor's trust (containing all Trust property except what was in the decedent's credit shelter trust) outright as his own property, but he had to receive at least an unuseable general power of appointment over the assets in the survivor's trust. In accord we are instructed:

> "The federal estate tax marital deduction allows property to pass free of estate tax to the surviving spouse. It postpones the estate tax until the survivor's death, generally the time at which the property accumulated during marriage passes to the next generation. ..." 1 Estate Planning Practice, California Continuing Education of the Bar (1991) §2.1 at pages 80 and 81. (Emphasis added.)

....

"Because the marital deduction represents a Congressional intent to defer tax, the terminable interest rule guards against the disappearance of the surviving spouse's interest at his or her death and its disappearance from or reduction in his or her taxable estate as well.

...Thus, if property is not transferred outright to the spouse, he or she must still receive one of the following interests in that property to qualify for the marital deduction: (a) a life estate in property with power of appointment over any remaining property (IRC §2056(b)(5)); (b) life insurance or annuity payments for life with power of appointment over any remaining payments (IRC §2056(b)(6); (c)) a life estate with no power of appointment (IRC §2056(b)(7)), when the executor elects to treat the property as qualified terminable interest property (QTIP); or (d) a life interest in a qualified charitable remainder trust, when the spouse is the only noncharitable beneficiary (IRC §2056(b)(8)). ..." 1 Estate Planning Practice, California Continuing Education of the Bar (1991) §2.7 at pages 86 and 87. (Emphasis added.)

Mr. and Mrs. Sibley agreed to leave the surviving spouse only an unuseable general power. In the Sibley Trust, B.23 (1 A.A. 44.) was that unuseable general power. B.23 was only an "unuseable" power because, pursuant to B.19 (1 A.A. 43.), Trust provisions in the body of the Trust controlled over conflicting provisions in the Administrative Provisions and B.23 (1 A.A. 44.) was in the Administrative Provisions and Trust Provision 3.3 (1 A.A. 29.), which was in the controlling body of the Trust, mandated only joint exercise of any "... power to appoint or direct distributions from ..." the community property. Charles Johnson has testified that all the

Sibley property was community. (1 A.A. 62.) Pursuant to In Re Tatkow, 363-N.Y.S.2d 720 (1975), the IRS will allow a marital deduction even though a general power is not actually usable due to a contract between the parties. Because, the fact that there is an estate planning provision providing the general power necessary to comply with IRS requirements for the marital deduction, does not preclude the finding of a contract between parties that such a general power cannot actually be used. The court explains in In Re Tatkow:

> ".... In determining in such joint will cases whether a survivor is contractually and irrevocably bound with respect to the gift over to third party beneficiaries, the Courts have applied equitable principles not at all applicable to tax issues. ...
>
> ...
>
> ... However, in a tax issue, it does not matter in the least whether the spouses, as between themselves, are contractually bound or not contractually bound. Whether the interest in property passes to the survivor voluntarily or pursuant to a contract, the estate of the first to die is entitled to the marital deduction (Newman v. United States, D.C. 176 F.Supp. 364).
>
> ....
>
> That such distinction exists may reasonably be inferred from the decisions which hold that a tax decision allowing the marital deduction would not be res judicata in any subsequent proceeding by the third party beneficiaries to compel performance of the contract by the executors of the last spouse to die. (See Matter of Zeh, 281 App.Div. 929, 119 N.Y.S.2d 653 and Matter of Nortz, 272 App.Div. 485., 71 N.Y.S.2d 858 and cases cited.)
> ...." Tatkow, supra at 725, 726 (Emphasis added.)

....

"...The fact that the taxpayer is contractually bound under the terms of a will to leave whatever remains to third party beneficiaries does not disqualify the interest received by him from being allowed the marital deduction. (Matter of Kahn, supra [this Court] N.Y.L.J. August 5, 1974 p. 13.)" Tatkow, supra at, 730. (Emphasis added.)

In the Sibley Trust, B.23 (1 A.A. 44.) was the unuseable general power which was not actually useable because its use was forbidden by controlling Sibley Trust provision 3.3 (1 A.A. 29.)."

QUOTE OF ENDNOTE #4 FROM PGS. 25-26 OF THE OPENING BRIEF, CONSISTING OF AN EXPLANATION THAT THE CREDIT SHELTER TRUST ONLY TOOK $600,000 BECAUSE THAT WAS THE MAXIMUM AMOUNT THAT COULD THEREBY BE SAVED FROM TAXATION.

"It is not contested that Trust Provision B.28 provides that the decedent's trust (credit shelter trust) was composed of $600,000 because that was the maximum amount Mary Sibley could shelter from taxation when she died in 1991. 1 A.A. 45-46. Confirming this interpretation, trust & estate expert, Mark Solomon [one of DAVID JOHNSON'S attorneys], explained to the district court in the prior civil case:

> "At the time, it (the Sibley Trust) provided - - both when it was originally drafted in 1973 and again when amended in toto in 1986 - -it's - - the trust splits into two parts on the death of the first spouse.
>
> The first part, called the credit shelter trust - - or the decedent's trust in this case is the way they labeled it - - takes the $600,000 unified credit amount that was then available under federal law and sticks it into what becomes for the first time an irrevocable subtrust of the larger trust.
>
> The second part - - everything over $600,000, your Honor, goes into a second subtrust called a survivor's trust, and the survivor's trust in this case, assuming that we had about a 1.5 million - dollar estate, would be about $900,000. In the decedent's trust, it was about $600,000. ..." 1 A.A. 66-70. (Quote on 1 A.A. 70.) (Emphasis added.) [The actual value of the Trust is not known to Petitioners, as they have been improperly denied such discovery. But, the Sibley Trust is believed to have a present value in excess of $5,000,000. 2 A.A. 350-351]"

QUOTE OF ENDNOTE #5 FROM PGS. 26-27 OF THE OPENING BRIEF, CONSISTING OF AN EXPLANATION OF THE USE OF THE VOID "SPECIAL POWER" FOR ITS LANGUAGE WHICH PREVENTED TAXATION OF THE $600,000 PUT IN THE CREDIT SHELTER (BYPASS) TRUST.

"The intentionally void Special Power (1 A.A. 31.) reads:

> "4.5 Special Power of Appointment: The surviving spouse shall also have, with regard to the principal of the Decedent's Trust, the power to appoint said Trust, or any part thereof, either during life or by Will, to one or more persons or entities; provided, that this power may not be exercised to any extent in favor of the surviving spouse, the creditors of the surviving spouse, or the estate or creditors of the estate of the surviving spouse." (Emphasis by bolding plus underlining is added.)

Comment d to § 320 of the First Restatement of Property provides: "... Powers to appoint to ... any person except the donee or his estate, ... are examples of group descriptions too broad to create a special power as here defined. ..." (Emphasis added.) Thus, the 4.5 Special Power in the Sibley Trust is void as it "appears" to grant the survivor power to appoint to any person except the surviving spouse, the estate of the surviving spouse or the creditors of the surviving spouse which is "too broad to create a special power."

The void "Special Power" was intended by the testators to be a tax and creditor avoidance feature intended to prevent the IRS from ruling that the surviving spouse had the equivalent of a general power over the $600,000 that was put in the decedent's trust (credit shelter trust). Because, if there

was such a ruling, the estate would have been taxed on the $600,000. The following quote explains the tax law involved in preserving the $600,000 tax exemption:

> "... A bypass trust (credit shelter trust) commonly contains property equal in value to the exemption equivalent amount existing as of the date of an individual's death,... The unified credit ... (at the time of Mary Sibley's death in 1991 was) $192,800, and the exemption equivalent amount ... (in 1991 was) $600,000. ...
>
> ...[T]he bypass trust often has been designated as the "exemption equivalent trust" or the "credit shelter trust." ...
>
> The bypass trust is most frequently used by married individuals in conjunction with the marital deduction authorized by IRC §2056. By using a bypass trust (credit shelter trust), property equal in value to the exemption equivalent amount need not be taxed in either spouse's estate. ..." (1 Estate Planning Practice, California Continuing Education of the Bar (1991) §3.1 at pages 110 and 111.) (Emphasis added.)

> "If the assets of the bypass trust (credit shelter trust) are to be excluded from the surviving spouse's gross estate, he or she must not be given a general power of appointment as defined in IRC §2041(b). A general power of appointment is one that may be exercised in favor of the holder, his or her estate, or his or her creditors. The drafter must take particular care that any powers that may be exercised by a surviving spouse who is also trustee of the bypass trust do not constitute a general power of appointment. If the surviving spouse is deemed to have a general power of appointment over the assets of the bypass trust,

then the bypass trust assets will be included in the surviving spouse's gross estate. This will defeat the purpose of the bypass trust to reduce estate tax." 1 Estate Planning Practice, California Continuing Education of the Bar (1991) §3.9 at page 117.

"A special power of appointment allows a surviving spouse to appoint the bypass trust property in favor of a defined class of people. The class cannot include the surviving spouse, his or her estate, or his or her creditors. If it does, the power will be deemed a general power of appointment, and the trust assets will be included in the surviving spouses gross estate. IRS §2041. ..." 1 Estate Planning Practice, California Continuing Education of the Bar (1991) §3.13 at page 119. (Emphasis added.)

[Therefore, by using a void "Special Power" with its language excluding "the surviving spouse, his or her estate, or his or her creditors" from taking the $600,000 in the bypass trust (credit shelter trust), the Sibleys prevented a finding that the surviving spouse had the equivalent of a general power over the $600,000 and prevented its taxation.]"

For extensive other authority confirming that Sibley Trust "Special Power" is void, as a power of appointment see the quoted material beginning on 111a.

QUOTE FROM 1 A.A. 197-202 OF EXTENSIVE OTHER AUTHORITY CONFIRMING THAT SPECIAL POWER IS VOID, AS A POWER OF APPOINTMENT.

"3. AS A MATTER OF LAW, THE SPECIAL POWER FOUND AS PROVISION 4.5 IN THE SIBLEY TRUST IS VOID, AS UNFETTERED FREEDOM TO APPOINT TO ANYONE, EXCEPT "the surviving spouse, the creditors of the surviving spouse, or the estate or creditors of the estate of the surviving spouse" DOES NOT CREATE A CERTAIN CLASS DESIGNATED BY THE DONOR AND THEREFORE DOES NOT CREATE A VALID SPECIAL POWER OF APPOINTMENT AS IT IS VOID AS TOO UNCERTAIN AND INDEFINITE.

In the SIBLEY1973 TRUST, paragraph 4.5 reads:

> "4.5 Special Power of Appointment: The surviving spouse shall also have, with regards to the principal of the Decedent's Trust, the power to appoint said Trust, or any part thereof, either during life or by Will, to one or more persons or entities; provided, that this power may not be exercised to any extent in favor of the surviving spouse, the creditors of the surviving spouse, or the estate or creditors of the estate of the surviving spouse." (2 J.A. 427.)

This power of appointment is void as there is no specific mention in the SIBLEY1973 TRUST of the class of persons in whose favor, this special power of appointment may be used. As the law is:

> "To create a valid power, either beneficial or in trust, it is indispensable that the objects to be benefitted by its execution shall be specified in or be clearly ascertainable from the instrument by which the power

is attempted to be created. ..." 62 Am Jur 2d (1990) §36, at page 158.

In accords with the RULE OF LAW that unfettered freedom to appoint to anyone but the trustee, his creditors, or his estate does not create a certain class, please see the quoted portions of following authorities:

Egleston v. Trust Co. of Georgia, 93 S.E. 878, 879 (Ga. 1917) reads:

> "The Trust Company of Georgia, as executor of the will of Thomas Egleston, deceased, filed a petition for construction of the will, and for general directions. William Egleston filed his intervention. A codicil to the will contained, among other provisions, the following:
>
> "And that any person not named for bequests by being overlooked by me, and who the executors feel was an oversight, be provided for liberally and before the provision is made of any charitable object."
>
> The judge of the superior court in his decree held that:
>
> This provision is "too indefinite to be effectual, and is incapable of being carried out by the executor and the advisory trustees, or either of them, and is therefore void and of no effect."
>
> ....
>
> ...[W]e are of the opinion that the provision of the codicil is unenforceable, because it is too indefinite and too uncertain. The provision is not limited to friends to relatives, or to any class of "persons." ...
> In the case of Minot v. Parker, 189 Mass. 176, 75 N.E. 149 ..., the court had under consideration the terms of a will where the testator bequeathed a part of his estate to "any of testator's relatives who 'without reason' he might have overlooked, such sum was might seem to *

* * his executors, under all the circumstances, fitting, suitable, and proper." This provision was held void for uncertainty and indefiniteness. ...

...

The trial court did not err in adjudging that the provisions of the codicil in question were void and of no effect. ..." (Emphasis added.)

In Davison v. Wyman, 100 N.E. 1105, 1106, 1107 (Mass. 1913), the court construed and found void, the following provision with the following language:

"... " ...Any surplus of my estate remaining after the payment of said fifteen thousand dollars to said Addision Gilbert Hospital shall be disposed of by my executors (and trustees) at their absolute discretion and according to their own judgment."

...

...We cannot avoid the conclusion that she did not intend them to take this sum for their own benefit, but to dispose of it, though in a manner left to their own unfettered discretion.

Under such circumstances it is settled by our decisions that the trust upon which this sum was held was to indefinite to be carried out, and that a resulting trust arose for the benefit of the next of kin of the testatrix. Nichois v. Allen, 130 Mass. 211, 39 Am.Rep. 445; Oliffe v. Wells, 130 Mass. 221; Minot v. Attorney General, 189 Mass, 179, 75 N.E. 149; Wilcox v. Attorney General, 207 Mass. 198, 93 N.E. 599; Ann Cas. 1912A, 833.

We have not thought it necessary to cite the many decisions in other jurisdictions to which we have been referred by the diligence of counsel, upon questions more or less closely resembling the point here presented. We are satisfied that our conclusion is

supported by sound reason and by the great weight of authority. ..." (Emphasis added.)

We are informed in Estate of Stewart v. Caldwell, 271 So.2d 754, 755, 756, 757 (Fla.1972):

"Petitioner, Thomas Young, brought suit in County Judge's Court, Palm Beach County, for construction and revocation of probate of a portion of the Last Will and Testament of his sister, Ruth Y. Stewart, the fifth paragraph of the Will, the portion in question, provides as follows:

".... "(e) *Upon the death of my brother, the said trust shall terminate, and I direct and empower my Trustees thereupon to devise, pay over and distribute the principal of said trust as then constituted, together with any accumulated or accrued income, among such of my relatives as may then be surviving and among charitable, educational or religious corporations, and in such proportions, as my friend and attorney, WILLIAM A. SHEA, shall, in his sole and exclusive discretion and judgment, fix, designate and determine.*" ....

...

The power of appointment given Shea under the Will is a naked power not coupled with interest, in that he neither has nor acquires, any estate in the interest to be disposed of. The power is also classified, as the Court below correctly held, as a special power of appointment, in that it is a power to appoint among members of a class or classes specified in the Will. Unlike a general power, a special power of appointment cannot be exercised in favor of the donee or his estate.

...

...

Despite the need for flexibility, however, there

are limitations on the degree of ambiguity and lack of specificity that can be upheld in a special power of appointment.[22] Paragraph Fifth (e) of the Will in the instant case exceeds those limitations. The power to appoint to "such of my relatives as may then be surviving" standing alone, might be subject to interpretation and enforcement on behalf of such a class. The cumulative effect, however, of the whole named and ill-defined classes renders the entire provision invalid.

..." (Emphasis by underlining added.)

It is stated in District of Columbia, et al. v. Adams, 57 Fed.Supp. 946, 947 (D.C. 1944):

"This is a motion for summary judgment filed by intervening plaintiffs Clarke and O'Donnoghue. They allege that they are the only living heirs at law and the next of kin of Benjamin Franklin O'Donnoghue, deceased who died testate on February 1, 1943. His will, admitted to probate by this court on July 1, 1943, contained the following provisions:

"Second, I order that my said executor shall gather all of my household effects and dispose of same according to his best judgment.

---

[22] *At this point the decision includes the following important foot note #7:*

"62 Am.Jur.2d Powers § 7: "To create a valid power of appointment, either beneficial or in trust, it is indispensible that the object or objects to be benefited by its execution shall be specified in or be clearly ascertainable from the instrument by which the power is atempted (sic) to be created. For the creation of a valid power in trust, it is essential that its execution be beneficial to some person or class of persons other than the grantee of the power who can compel the due execution of the trust, which person or class of persons must be designated in or be clearly ascertainable from the instrument by which the power is created." " (Emphasis added.)

"Third, I order that my said executor shall collect all monies and property of any description due and belonging to me from any bank or insurance company, or from any other source, and dispose of all of same according to his best judgment."

...

The executor named in the will is the defendant herein, George Edward Adams, who, on July 2, 1943, was granted letters testamentary by this Court. Plaintiffs Clarke and O'Donnoghue pray that the above-quoted provision of the testator's will be construed as void for uncertainty and generality, and for an adjudication that the executor holds the personal property belonging to the estate of testator for the benefit of said plaintiffs. ...

...

This will does not create an express trust, either by direct fiduciary expressions or by precatory words, since those to whom the property is to be distributed are uncertain. Nor is an implied trust created for the benefit of defendant. Nor is there an absolute bequest to him. He holds the estate for the benefit of plaintiffs Clarke and O'Donnoghue as next of kin. General Clergy Relief Fund v. Sharpe, 43 App.D.C. 126. ...

The motion for summary judgment will be granted. ..." (Emphasis added.)

In accord with the above authority, we read in In Re Sheifer's Estate, 34 N.Y. Supp.2d 302, 303, 304 (1944):

"Deceased provided a trust fund for his brother's benefit and directed that when the brother died certain disbursements were to be made from the capital of the fund. ...

"C. The balance of the said one-half trust fund after making the aforesaid two payments shall be paid

and disposed of by my executors and trustees to any charitable institution or institutions or to any person, persons, individual or individuals that my said executors and trustees seek (sic) fit and proper.

"I have [t]he fullest confidence in my said executors and trustees that they are well aware of my wishes and that they will carry out my request faithfully and I further declare that the judgment of my executors and trustees in disposing of the said balance of the trust fund upon the death of my brother, except as otherwise provided in the within codicil, shall be final and conclusive and not be questioned in any court or proceeding by anyone whomsoever."

...The question presented is whether the gift in the quoted text may be enforced. If it may not, there is intestacy and the fund must be divided pursuant to the applicable ...Decedent Estate Law. The trustees propose to make a distribution to a person not related to the deceased, to certain relatives of the deceased and to certain institutions which are described as charities "and other worthy causes."

... The gift must be held void for uncertainty on the authorities herein above cited." (Emphasis added.)

We are instructed in: In Re Ralston's Estate, 37 P.2d 76, 77 (Cal. 1934):

"The decedent died intestate in Los Angeles county, leaving as his next of kin and heirs at law two grandsons. The pertinent provisions of his will, of which the respondent is the duly appointed and acting executor, read as follows:

"I give and bequeath in trust to L.R. Kagarise * * * my entire property at my death, ... and I hereby give and bequeath to the said L.R. Kagarise absolute

authority to dispose of this my entire estate as he may see fit. * * *

"I appoint the said L.R. Kagarise as my executor and administrator of my estate as he has always been my good friend, and I have absolute confidence in his honesty, and will do as well in disposing of my estate as I could if I were still alive."

...

Contending that the trust attempted to be created by the decedent is invalid and void for uncertainty, and that the decedent's estate therefore passes to them in equal shares as his next of kin and only heirs at law, the two grandsons commenced this proceeding. ...

...It is essential to the validity of a trust, ... that the object or persons intended to have the benefit thereof be certain. The authorities are legion to this effect. The "trust" here involved is defective and invalid because of its complete failure to indicate either the object or person to benefit thereby.

..." (Emphasis added.)

Also in accords with the requirement that in order to create a power in a trustee there must be certainty in the beneficiaries, by class or individually see: McKee v. Hedges, 297 S.W.2d 45 (Ky. 1957) and In Re Rowlands' Estate, 241 P.2d 781 (Ariz. 1952), and many other authorities.

A minority position which only applies to "limited" and not "special powers of appointment" is presented in Leach v. Hyatt, 423 S.E. 2d 165 (Va. 1992). However, it is important to stress:

1) It is a minority position;

2) Even as a minority position, it is not applicable to "special powers of appointment", but rather is only applicable to "limited powers of appointment";

3) It distinguishes between "special powers of appointment" and "limited powers of appointment" and,

4) Even with regards to "limited powers of appointment" it is only applicable where the donor's intent to establish the power is unambiguously expressed." ...

The power in the SIBLEY1973 TRUST is clearly labeled as a "special power of appointment". (2 J.A. 427)

Matter of Estate of Boyer, 868 P.2d 1299 (N.M.,App. 1994) also deals with a limited power of appointment, but reaches a different conclusion from the court in Leach and only cites Leach as a contra minority position. In Matter of Estate of Boyer, the New Mexico Court of Appeals upheld the trial court's granting of a motion for summary judgment that the subject power of appointment was void...."